80-1365

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CONNECTICUT

Petitioner

v.

MOHEGAN TRIBE

Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 73—September Term, 1980

(Argued September 12, 1980

Decided December 17, 1980)

Docket No. 80-7348

MOHEGAN TRIBE

Plaintiff-Appellee,

—against—

STATE OF CONNECTICUT

Defendant-Appellant.

Before:

FEINBERG, *Chief Judge,*
LUMBARD and OAKES, *Circuit Judges.*

Interlocutory appeal under 28 U.S.C. § 1292(b) from an order of the United States District Court for the District of Connecticut, Blumenfeld, J., denying a motion to dismiss an action for possession of land on the ground that the land involved was within the coverage of the Nonintercourse Statute, 25 U.S.C. § 177, and its predecessors.

Affirmed.

FRANCIS J. MACGREGOR, Assistant Attorney General, Hartford, Connecticut (Carl R. Ajello, Attorney General, Gerard J. Dowling, Assistant Attorney General, Hartford, Connecticut, of counsel), *for Defendant-Appellant.*

JEROME M. GRINER, ESQ., West Hartford, Connecticut, *for Plaintiff-Appellee.*

RICHARD S. COHEN, Attorney General of the State of Maine (James D. St. Clair, Esq., William F. Lee, Esq., Hale and Dorr, Boston, Massachusetts, of counsel), *Special Counsel to the State of Maine as Amicus Curiae.*

THOMAS N. TUREEN, ESQ., Portland, Maine, Richard B. Collins, Esq., Boulder Colorado, Native American Rights Fund, *counsel for Passamaquoddy Tribe and the Penobscot Nation as Amicus Curiae.*

LUMBARD, Circuit Judge:

This appeal requires us to decide whether the Nonintercourse statute,[1] which, since 1790, has prohibited the sale of Indian land unless conveyed by a treaty approved by the federal government applies to land throughout the United States. The appeal arises out of a suit brought against the State of Connecticut in the District Court for Connecticut by the Mohegan Tribe of Indians to regain possession of some 2,500 acres of land in the Town of Montville, Connecticut. In its defense, the State of Connecticut filed a motion to dismiss the suit on the ground that the Nonintercourse statute was intended to apply only to land in "Indian country" and thus did not protect the land at issue here. Judge Blumenfeld denied the State's motion, holding that the statute was meant to apply to Indian lands throughout the United States. *Mohegan Tribe v. State of Connecticut*, 483 F. Supp. 597 (D.Conn. 1980). At the State's request, Judge Blumenfeld certified the question of the statute's geographic applicability for appeal pursuant to 28 U.S.C. § 1292(b), and we consented to hear it. We find ourselves in substantial agreement with the reasoning of the district court and therefore affirm.

In the past few years numerous suits have been brought by Indian tribes still residing in the eastern parts of the United States.[2] These tribes have asserted claims to large tracts of land in the East, thereby throwing into uncertainty the validity of land titles throughout the area.

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[1]The statute is presently contained in 25 U.S.C. § 177. Its history is more fully traced below.

[2]*See, e.g., Oneida Indian Nation v. County of Oneida*, 464 F.2d 916 (2d Cir. 1972), *rev'd* 414 U.S. 661 (1974), *on remand* 434 F. Supp. 527 (N.D.N.Y. 1977); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.) *cert. denied*, 444 U.S. 866 (1979); *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F. Supp. 780

These suits have been based upon the claim, after a century and a half of occupation by non-Indians, that the states in the East entered into treaties with and purchased land from Indian tribes after the passage of the Nonintercourse statute, which by its terms apparently forbade such transactions without the participation of the federal government. To date, the Indians have been largely successful in their legal battles regarding their claims to the eastern lands. Defenses based upon state adverse possession laws and state statutes of limitation have been consistently rejected.[3] The only grounds upon which the States have thus far succeeded in defeating Indian claims is in demonstrating that plaintiffs in these suits do not properly represent an existing tribe which can be proved to be the legitimate descendant of the original landholding tribe.[4]

In these suits, defendant states have marshalled historical evidence which suggests that the eastern Indian tribes and their lands were always understood to be under the jurisdiction of the states. While these arguments have been held to be unavailing in a number of other contexts, such as whether the eastern tribes were properly considered "tribes" under the protection of the federal government,[5] and whether they were considered

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(D. Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D. R.I. 1976); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me. 1975); *aff'd*, 528 F.2d 370 (1st Cir. 1975). Some of these suits have resulted in settlements authorized by Congress. This is true of the Rhode Island claims litigated in *Narragansett*, and, quite recently, of the Main claims at issue in *Passamaquoddy*.

[3]*See, e.g., Oneida, supra* note 2, 434 F. Supp. at 541-44; *Schaghticoke, supra*, note 2, 418 F. Supp. at 803-06. In this suit, however, the State has asserted a defense based upon the "federal common law of laches." That issue is not before us on this appeal, and therefore we express no opinion on its validity.

[4]*See, e.g., Mashpee, supra*, note 2.

[5]*Passamaquoddy, supra*, note 2.

"tribes" for purposes of sovereign immunity to suit,[6] until this action, no court has had to address directly the issue of whether the Nonintercourse statute was intended to apply to land held by the eastern tribes. The State's argument is admittedly appealing in that it would explain why both the states and the federal government have ignored so completely what the Indians assert to be the dictates of the Nonintercourse statute, however, it is necessary to trace the history of the Indian statutes and relevant aspects of Indian land tenure in this country.

I. HISTORY OF INDIAN LEGISLATION

In the Royal Proclamation of 1763, the British Crown declared that the power to "grant Warrants of Survey, or pass Patents" for land in the American territory resided solely in the Crown and not in the Governors or Commanders in Chief of the Colonies. The lands were "reserved to the . . . Indians" unless the sovereign was to decide otherwise. 1 Laws U.S. 443-48.[7] Moreover, the Proclamation, for apparently the first time, established a boundary line between the Indian territory or "Indian country" and the lands of the colonists. Trade which occurred beyond the line could only be conducted with the consent of the Crown. At the same time, land grants throughout the American territories were solely within the authority of the sovereign: grants "upon any Lands whatever, which, not having been ceded to or purchased by us as aforesaid, are reserved to the said Indians, or any of them." *Id.* Thus, the policy of the Royal Proclamation was to demarcate an "Indian country" within which trading could only be conducted with the approval of the Crown, and to establish that all grants of land from the Indians would be valid only with the approval of the sovereign.

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[6]*Bottonly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979).

[7]The Proclamation is reprinted in H. Commager, Documents of American History 47-50 (8th ed. 1968).

During the Revolution and prior to the Articles of Confederation, the Continental Congress created a Department of Indian Affairs in 1775. The jurisdiction of the Department was divided into three areas, again all lying along the border of so-called "Indian country." 1 Laws U.S. 597. It was not until after the adoption of the Articles of Confederation in 1781, however, that the policy of the colonies toward Indian trade and, in particular, toward alienation of Indian lands was codified. First it is essential to note that Article IX of the Articles of Confederation gave the central government exclusive power over Indian affairs with the limitation that such power could not be exercised in such a manner as to infringe upon the "legislative right" of any state. Thus, in the Resolve of 1783, 1 Laws U.S. 607-08, Congress affirmed the prior policy of the Royal Proclamation of 1763 by establishing that all land transactions with the Indians would be invalid unless approved by the federal government, but it limited the effect of the Resolve to lands outside the borders of the states.

Federal policy during the Confederation thus continued the requirement that dealings with the Indians respecting land sales would only be valid of accomplished with the authority and approval of the central government. However, due to the division of authority between the states and the central government as established in the Articles of Confederation, land transactions within the individual states were left to the authority of the states. On this point the Resolve of 1783 specifically referred to the division of powers established in the Articles of

Confederation. *See id.*

The limitations of federal authority to deal with Indian affairs contained in Article IX of the Articles of Confederation were removed in the Constitution. Instead, the Constitution granted Congress the authority to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. Thus, Congress

was granted plenary authority to regulate trade with the Indian tribes throughout the United States.[8]

In 1790, Congress enacted the first of the Indian Trade and Intercourse Acts. Act of July 22, 1790, ch. 33, 1 Stat. 137 ("1790 Act"). The majority of sections of the Act established a system of licensing for trade with the Indians and imposed federal authority over crimes committed on Indian property. Section 4 of the Act contained the first Nonintercourse statute:

> *And be it enacted and declared*, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person, or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

The statute thus continued the policy of placing authority to extinguish Indian land rights in the sovereign.

In order to appreciate the meaning of the first Nonintercourse statute, the peculiar nature of Indian land tenure in the United States must be noted.[9] In accordance with the "right of discovery" of the European settlers, native Indians found in this country were granted the "right of occupancy" to their lands. That is, the natives were allowed to remain upon their lands, but their freedom to alienate those lands was restricted. The land could be sold only to the European settlers or the

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[8]This authority was recognized in a series of court decisions culminating in Chief Justice Marshall's definitive statement on the scope of federal power in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[9]This history is best described in the early opinion, by Chief Justice Marshall, in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) and in the more recent opinion by Justice White in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974).

governmental authority representing those settlers. This would prevent, for example, Indians from selling their lands to another foreign government, hostile to the settlers. Thus, while the Indians retained the "right of occupancy," the settlers retained the "fee interest" in the land and retained a "pre-emptive right" to purchase the land from the Indians. After the Revolution, this "pre-emptive right" lay in the individual states — at least in the already settled part of the country. And when the states joined the Union, unless they ceded the lands, they retained their "pre-emptive rights." Nevertheless, the right to purchase Indian lands was not inconsistent with federal control over the extinguishment of Indian occupancy. Thus, the first Nonintercourse statute provided that even where the states retained "pre-emptive rights" to purchase the land, the federal government was responsible for overseeing any transfer of land from the Indians to the states.

The provisions of the Indian Trade and Intercourse Act of 1790 were amended and reenacted five times.[10] In 1793, Congress supplanted the Act of 1790, and continued the regulation of trade with the Indian tribes, providing in more detail for the licensing of such trade and for the enforcement of criminal law on Indian property. More important for our purposes, section 8 of the 1793 Act continued the Nonintercourse statute with minor changes:

> *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe or Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty

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[10]Act of March 1, 1973, ch. 19, 1 Stat. 329 ("the 1793 Act"); Act of May 19, 1796 ch. 30, 1 Stat. 469 ("the 1796 Act"); Act of March 3, 1799, ch. 46, 1 Stat. 743 ("the 1799 Act"); Act of March 30, 1802, ch. 13, 2 Stat. 139 ("the 1802 Act"); Act of June 30, 1834, ch. 161, 4 Stat. 729 ("the 1834 Act").

> of convention entered into pursuant to the constitution . . . *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

When reenacted in 1796, the Act, for the first time, contained in its first section the description of a boundary line "established by treaty between the United States and various Indian tribes," extending from Lake Erie down the Cayahoga and Ohio Rivers, through Kentucky and eventually to South Carolina, delineating settled territory from "Indian country." The first section also contained a proviso that:

> if the boundary line between the said Indian tribes and the United States, shall, at any time hereafter, be varied, by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act, shall be construed to apply to the said line so to be varied, in the same manner, as the said provisions now apply to the boundary line herein before recited.

1796 Act, § 1. Again a licensing system was imposed for trade beyond the boundary, and crossing the boundary for certain purposes was prohibited. The Nonintercourse statute, with essentially the same language as in the 1793 Act, became section 12 of the 1796 Act. The Trade and Intercourse Act, as a whole, was reenacted with similar language in 1799 and 1802.

In 1834, however, certain changes relevant to the questions before us were enacted. First, the description of the boundary line between the United States and Indian country along with the proviso regarding changes in the line was eliminated and replaced with the description of Indian country as "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished." Thus, Indian country did not include any lands within the borders of these states. At the same time, the Act eliminated the phrase "within the bounds of the United States" in the Nonintercourse statute, so that no words of geographical application existed. The trade restrictions, contained in the other sections of the Act, were expressly limited to Indian country. However, section 29 of the 1834 Act stated that the repeal of the former sections of the earlier Acts would not "impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi.

The present Nonintercourse statute, 25 U.S.C. § 177, states simply that:

> No purchase, grant, lease, or other conveyance or lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law of equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

One other section of the Act, important to the question of the Nonintercourse statute's applicability to Eastern lands, shall be mentioned. Beginning in the 1793 Act, all of the Acts contained a section which provided that:

> nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

1793 Act, § 13. This "surrounded by settlements" exception was contained in all of the Acts except that of 1834 when it was eliminated. No comparable provision exists today.

The State of Connecticut makes two arguments based upon the Acts. First, the State argues that the Nonintercourse statute was never meant to apply to land outside of Indian country but was designed only to assure that land on the Western frontier of the country would be obtained from the Indians solely through federal treaties. Indeed, the State asserts that all of the provisions of the various Acts were meant to apply only in Indian country. Second, in the alternative, the State argues that the "surrounded by settlements" provisions were meant to exclude from the operation of the Nonintercourse statute and the Act as a whole, Indian lands in the already developed states. We now turn to these contentions.

II. STATUTORY LANGUAGE

As the district court noted, the proper place to begin in construing a statute is with the language of the statute itself. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). At first blush, it is apparent that the language of the Nonintercourse statute makes its dictates applicable to Indian land located anywhere in the United States. Section 4 of the Act of 1790, the original Nonintercourse staute, quoted above, contains no language suggesting any geographical limitation. In addition, section 4 expressly applies to "any State, whether having the right of pre-emption to such lands or not." This language makes plain that the statute was intended to proscribe land conveyances to the states, and therefore was not limited to protec-

tion of land outside the boundaries of any state. As noted earlier, only the original thirteen colonies had rights of pre-emption to Indian lands, yet the existence of this right of pre-emption did not exclude the existence of federal authority to determine the conditions under which Indian title to land within those states would be extinguished.

The 1793, 1796, 1799, and 1802 Nonintercourse statutes contain the language that no purchase of Indian lands "within the bounds of the United States" will be valid unless accomplished by a federal treaty. This is especially significant considering that, in these Acts, a detailed boundary was drawn which divided settled areas from Indian country. While this language was eliminated from the 1834 Act (along with the detailed description of the Indian boundary), section 29 of the Act specified that the provisions of the 1802 Act, which contained the "within the bounds" language, were still in force with respect to tribes east of the Mississippi. In any event, the 1834 Act and the present statute also contain no language limiting the applicability of the land transfer provisions.

The State of Connecticut contends, however, that the language in the original Nonintercourse statute referring to sales to States with rights of pre-emption and language in subsequent statutes referring to sales to authorized state agents was meant solely to include within federal control land purchases by those of the original states through which the Indian boundary passed, so that those lands within Indian country yet also within the bounds of the original states would be covered. Further, the State argues that the "within the bounds of the United States" language was merely meant to exclude land transactions with Tribes residing outside of the United States who claimed land within the United States. The second contention is simply historically inaccurate, since the United States in fact entered into treaties with tribes under the jurisdiction of foreign countries respecting land within United States borders, and these treaties complied with the requirements of the federal

statutory restraints against alienation. *See e.g.*, Treaty of May 31, 1796, with the Seven Nations of Canada, 7 Stat. 55, which conformed to the requirements of section 12 of the 1796 Trade and Intercourse Act. *See generally*, R. Clinton & M. Hotopp, *Judicial Enforcement of the Federal Restraints on Alienation of Indian Land: The Origins of the Eastern Land Claims*, 31 *Main L. Rev.* 17, 30 n. 71 (1979).

The contention that the statute as well as all the provisions of the various Acts was meant to apply only to those parts of the original states which were considered to be within Indian country, while plausible, is amply refuted by inspection of the language of other sections of the various Acts and the structure of the Acts as a whole.[11] To begin with, it is plain from the other sections of the various Acts that Congress was quite explicit when it needed to refer either to Indian country or to the Indian boundary. For example, section 3 of the 1790 Act refers to criminal penalties against those who "attempt to trade with the Indians tribes, or shall be found in the Indian country." The 1793 Act contains the same language in its section 3. Section 6 of the 1793 Act refers to purchases of "any horse [from] an Indian, or [from] any white man in the Indian territory." In the 1796 Act, where Congress was dealing with lands lying west of the described border of Indian country, it did so specifically: section 2, for example, refers to penalties against citizens who cross over, or go within the "said boundary line." And section 14 refers to Indians who cross the "said boundary line." Section 16 of the Act of 1799 refers to persons "found in the Indian country over andbeyond the said boundary line." The 1834 Act states specifically in section 2 that trade with the Indians "in

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[11]The district court rejected the State's argument as being inconsistent with the 1834 Act's description of Indian country as existing solely outside the jurisdiction of the states. We note, however, that section 29 of the 1834 Act retained the provisions of the 1802 Act as they applied to tribes east of the Mississippi. We therefore rely upon other evidence found in the various Acts.

the Indian country" is prohibited unless a license is first obtained from the government. The term "Indian country" also appears in sections 3, 4, 6, 7, 10, 16, 17, 20, 23, 24, and 25 of the 1834 Act. Yet as noted earlier, the Nonintercourse statute contained in the 1834 Act makes no mention of any geographic limitation.

Aside from the plain language of the Nonintercourse statute and the fact that the term "Indian country" does appear in other sections of the Act, other elements of the structure of the Act also rebut the State's argument. First, as noted by the district court, the "surrounded by settlements" exception would make no sense if the Acts as a whole were meant to apply only to Indian country,[12] since no territory within Indian country could have been so surrounded. Second, as also noted by the district court, the provision respecting the President's power to take measures to prevent the sale of alcohol to the Indian tribes, originally adopted in the 1802 Act without any language of geographical limitation, was amended in 1822 to state that the President would be given the power in particular to authorize searches of the wares of traders upon information that "ardent spirits" were being "carried into the Indian countries by said traders." Act of May 6, 1822, ch. 581, 3 Stat. 682. When incorporated into the 1834 Act, the provisions relating to alcohol were specifically limited to "Indian country." 1834 Act, § 20. These changes would have been unnecessary had the 1802 Act applied only in Indian country.

Third, it is particularly striking that despite the large number of references to Indian country and Indian territory contained in the Acts, mentioned above, a number of other provisions including the Nonintercourse statutes contain no language of geographic limitations. These provisions contain

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[12]The State's argument, in the alternative that this exception applies to eastern land transactions is discussed below.

restrictions respecting trade simply with "any Indian tribe" or respecting "lands belonging to any Indian tribe." For example, section 5 of the 1793 Act imposes penalties for making a settlement upon "lands belonging to any Indian tribe." Similarly, section 9 of the 1793 Act provides for furnishing services to "the friendly Indian tribes" without geographic limitation. Yet Section 6 of the 1793 Act specifically prohibits horse trading without a license "in the Indian territory." Thus examination of the provisions of the 1793 Act suggests that Congress was careful to distinguish between regulations applicable only to Indian country and those applicable to all Indian tribes and their lands. Further examples could be drawn from the subsequent Acts. We conclude that, by failing to use language restricting applicability of the Nonintercourse statute, Congress intended the statute to apply throughout the United States.

Indeed, as noted by the district court, the only arguments with respect to the language of the Acts that the State can muster in support of its view that the Nonintercourse staute applied solely in Indian country are rather tenuous. The State first points to the titles of the various Acts. For example, the 1796 Act is entitled, "An Act to Regulate Trade and Intercourse with Indian Tribes and to Preserve Peace on the Frontiers." From this, the State argues that the statute was concerned only with land transactions on the frontiers. Apart from the purposes of the Acts, which we will discuss below, it is sufficient to note here that the "Peace on the Frontiers" language was not contained in the titles of the 1790 or 1793 Acts, and that, although useful in interpretation of ambiguous provisions, the title of an Act cannot be held to contradict the more specific language contained in the body of the Act.

The only other argument based upon statutory language concerns the provisos contained in the 1796, 1799 and 1802 Acts' description of the Indian boundary. These provisos stated that if the boundary is subsequently altered by treaties

with the Indians, "*all the provisions* contained in [the Acts] shall be construed so as to apply to the said line so to be varied in the same manner, as said provisions apply, by force of [these Acts] to the boundary line hereinbefore." (Emphasis added.) The State emphasizes the first few words of the proviso, but when read as a whole it is quite plain that the proviso applied if subsequent treaties should alter the boundary and provided that those sections which did apply to the boundary would similarly apply to any new boundary established by those treaties. Hence, those sections that did not apply to the boundary would be left unaffected.

Thus, the conclusion to be drawn from the language of the Nonintercourse statute and the various Acts is that the statute was meant to apply to Indian land throughout the United States. In regulating relations with the Indians, Congress imposed certain restrictions on transactions occurring in Indian country and certain others to those involving Indians situated throughout the United States. The Nonintercourse statute, containing no language of limitation, must then be read as applying to all Indian lands.

III. LEGISLATIVE AND JURISDICTIONAL HISTORY

Connecticut, however, makes a number of arguments for its interpretation of the statute based upon external evidence: first, the State argues that the purposes of the Trade and Intercourse Acts were both to preserve peace on the frontier and to enforce treaty obligations and that neither of these purposes would require protection of lands outside of Indian country. Moreover, it finds support for these views in the history of English and colonial legislation regarding Indian lands as well as federal Indian policies during the Confederation. Finally, the State points to evidence of executive branch interpretation of the Acts also indicating that the Acts were understood to leave land transactions with eastern Indian tribes to the control of the states. We are not persuaded.

As the Supreme Court has noted with respect to Indian legislation and treaties, "[t]hese instruments . . . cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191, 206 (1978); *accord, Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 (1979). Certainly, courts should never ignore strong extrinsic evidence which may serve to explain the meaning of statutory enactments, particularly when the statutes are as deeply embedded in American history as are those relevant here.

Legislative history is practically nonexistent on the particular issue of geographic applicability. There is only a single sentence in the House Report on the 1834 Act which suggests that that Act was meant only to apply outside the jurisdiction of any of the states.[13] However, as the district court recognized, the effect of this isolated statement is undercut by the subsequent amendment to the Act which added section 29 — the section which continued in effect provisions of the 1802 Act insofar as they applied to Indians east of the Mississippi.

Apart from this, the State's argument as to Legislative intent is not so much directly on the point of geographic applicability as it is on the motivation for granting federal protection to the Indians. The evidence suggests that federal Indian policy was based upon the need to prevent Indian uprisings. Accordingly, certain concessions were granted to the Indian tribes in order to avoid the necessity for large-scale military intervention.

Thus, the State directs our attention to statements by President Washington, and his Secretary of War, Henry Knox,

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[13] "This bill is intended to apply to the whole Indian country . . .; it will continue to embrace only those sections of the country not within any State . . . ." H.R. Rep. No. 474 23d Cong., 1st Sess. 10 (1834).

both of whom played a large part in developing the original Trade and Intercourse Act, regarding the necessity of restraining settlers from encroaching upon Indian lands on the frontier, since these encroachments were a constant source of Indian unrest.[14] The State also points to the writings of several historians respecting Washington's and Knox's desire to satisfy the concerns of the Indians over the activities of settlers along the frontier.[15] While the evidence rather convincingly demonstrates that the nation's early leaders were perhaps not so charitable toward the Indians as we have come to view them, and although this evidence quite readily demonstrates that contemporary attitudes have colored our views of the original motives behind American Indian policy, we do not believe that the evidence in any way rebuts the Nonintercourse statute's applicability to Indian lands throughout the United States. Of course, Washington and Knox and their countrymen were concerned not only with protecting the Indians, but with preventing the onset of overt hostilities. Moreover, it is true that peace along the frontier, and in particular the prevention of encroachment by non-Indian settlers on Indian lands along the frontiers, were primary objects of the Act's land provisions. Nevertheless, there is nothing inconsistent with these views in reading the Nonintercourse statute, as its language suggests, to include encroachment upon Indian lands throughout the United States. Such a promise may well have been thought best to mollify the apprehensions of Indians on the frontier as well as those in the settled regions. Surely it would have furnished evidence to the Indians of the seriousness of the federal gov-

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[14]*See, e.g.*, various statements by President Washington printed in 1 J. Richardson, Messages and Papers of the Presidents 59-60, 61, 67-68, 71, 104; and Knox's report to Congress printed in 2 American State Papers — Indian Affairs 53.

[15]*See, e.g.*, F. Prucha, American Indian Policy in the formative years: The Indian Trade and Intercourse Act. 1790-1834 43-45, 48 (1962); S. Tyler, A History of Indian Policy 39 (1973); R. Horseman, Expansion and American Indian Policy 69-70 (1967).

ernment's intention to regulate land sales, a matter of great concern to the Indians.

The State also points to considerable evidence that the Acts were designed to enforce various obligations imposed by treaties with the Indians entered into by the federal government, and therefore the Acts were not concerned with the eastern tribes with whom no treaties were held. One of the most prominent commentators on Indian Law, Felix Cohen, has written that "each of the substantive provisions of the first Indian Trade and Intercourse Act fulfilled some obligation assumed by the United States in treaties with various Indian tribes," and that this analysis "would probably apply equally to each of the later trade and intercourse acts." F. Cohen, *Handbook of Federal Indian Law* 69-70 (1945). However, this does not support the view that the framers of Indian legislation did not also wish to protect Indian tribes located throughout the United States. Indeed, it may well have been to placate tribes located on the frontier or with whom the United States had entered into treaties that federal protection was granted to all Indian lands.

We thus agree with the district court that there is no evidence demonstrating that peace on the frontier and enforcement of treaty obligations were the *sole* purposes of the various Acts. We share the district court's intuition that if the states were meant to retain control over eastern Indian lands, some evidence of such authority would exist. Finally, as just noted, it would seem consistent with the goals of the early administrations to convince the Indians both on the frontier and elsewhere that the federal government meant to take into its own hands the problems of intrusions upon Indian property wherever they might occur.

As for the evidence regarding Indian policy preceding the various Trade and Intercourse Acts, we believe that examination of this history, outlined above, rebuts rather than supports

the State's position. As noted earlier, from the time of the Royal Proclamation of 1763, it was the policy of the sovereign to retain control over land transactions with the Indians in the central government, first the British Crown and later the federal government. The only period during which this was not the case was during the Confederation. During that period, as outlined above in discussing the Resolve of 1783, federal Indian policy was constrained by the limits imposed by Article IX of the Articles of Confederation. It was dissatisfaction with these limitations that led to the expansive definition of federal power to deal with the Indians under the Commerce Clause of the new Constitution. The State's argument that the new Congress declined to exercise its expanded powers and chose instead to maintain Indian policies established during the Confederation is highly implausible. Aside from lacking any support in the language of the enactments subsequent to the Constitution, or in any decisions of the courts, it is also rebutted by the history recited above suggesting that under its expanded powers Congress reverted to the policy established long before the Confederation that the sovereign would control all transactions with the Indians.

Lastly, the State asserts that evidence of the interpretation of the Acts by the executive branch supports its position. Admittedly, "[l]ongstanding, contemporaneous executive and administrative interpretation by those entrusted with the enforcement of ambiguous legislation may also shed light upon an appropriate construction" of statutory language. *Leary v. United States*, 395 U.S. 6, 25 (1969). The State points out that President Washington himself wrote in 1792 that the New England tribes were "so situated as to be rather considered a part of the inhabitants of the State of Massachusetts than otherwise, and that State has always considered them under its immediate care and protections." Letter to Archbishop John Carroll, quoted in P. Guilsday, *The Life and Time of John Carroll* 607 (1954). In more recent times, the federal government repeatedly disclaimed any responsibility for managing the affairs

of the eastern tribes. *See* Letter, W. A. Jones, Acting Commissioner of Indian Affairs to Francis M. Morrison, Esq., July 10, 1899; Letter, Commissioner of Indian Affairs C. J. Rhoades to Mrs. Edith M. Smith, October 12, 1931.

Nevertheless, the fact that the federal government disclaimed responsibility for these tribes is not determinative here. We believe that, although considerable evidence amassed by the State supports the proposition that the federal government did not avail itself of the provisions of the Nonintercourse statute and appeared to leave management of the affairs of the eastern tribes to the individual states, it does not follow that the federal government had no obligation to do so, or that the states had the authority — unimpeded by the Acts — to buy land from the eastern tribes without federal approval. We note, moreover, that there is no mention of any reliance by the federal government upon any geographical limitations contained in federal Indian legislation in the evidence offered. We also note that none of the evidence concerns land transactions.

IV. CASE LAW

The State, finally, relies upon statements in the case law which are said to determine the question of geographic applicability of the various Nonintercourse statutes and the Trade and Intercourse Acts as a whole. In our view, however, the case law is inconclusive on the issue.

The State points first to early decisions containing language suggesting that the Trade and Intercourse Acts were meant to be confined to Indian country. In *American Fur Co. v. United States*, 27 U.S. (2 Pet.) 357, 369 (1829), for example, the Supreme Court stated that "all the provisions contained in [the 1802] Act, and consequently, those contained in the amendatory act of 1822, are by [the first section] expressly confined" to

"Indian country." The Court, in *American Fur*, however, was concerned with the question of penalties for those found bringing "ardent liquors" into Indian country for trade with the Indians, and it held that only those goods of the traders found within Indian country were to be forfeited. The Court was construing only that section of the Act, added by amendment in 1822, respecting importation of liquor into Indian country and the penalties for doing so. Similarly, in *Bates v. Clark*, 95 U.S. 204, 205 (1877), the issue was whether goods seized by American military officers after finding that the owner intended to import liquor into Indian country for trade purposes, were properly seized inside of Indian country. While the Court used broad language respecting the applicability of the Act, it was only interpreting provisions relating to penalties for importation of alcohol, by that time contained in section 20 of the 1834 Act, and further amended by statute in 1864. While admittedly, the statements made in both *American Fur* and *Bates* suggested that all the provisions of the Acts, including the Nonintercourse statute, were limited to operation to Indian country, the Court in those cases was concerned with particular provisions of the Acts and suggested only that the trade and intercourse provisions were generally limited to Indian country.

The State also points to language, generally dicta, in various decisions recognizing state control over the eastern tribes. *See, e.g., Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 580 (1832) (McLean, J., concurring). It should be noted, however, that these comments were made in the context of constitutional decisions respecting the reach of federal control over the Indian tribes. On these issues, Justice McLean's views, while shared by certain state courts, *see, e.g., State v. Doxtater*, 47 Wis. 278, 2 N.W. 439 (1879), never commanded a majority of the Supreme Court. Instead, the majority view was that stated by Chief Justice Marshall in the *Worcester* opinion, noting that federal authority over Indian affairs was plenary, and that the grant to regulate "Commerce" among the Indian tribes gave

the federal government authority to regulate practically all aspects of Indian affairs.[16]

Third, the State cites a number of early decisions respecting Indian land tenure. *See, e.g., Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 31 (1831) (Baldwin, *J.*, concurring); *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *New Jersey v. Wilson*, 11 U.S. (7 Cranch) 164 (1812); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). Most of these cases are concerned with various conveyances by the states of lands formerly held by the Indians. None of them suggests limitations on the applicability of the Nonintercourse statute.

Most of the decisions cited involved transfer of a state's "fee" interest subject to the right of Indian occupation. *Fletcher v. Peck, supra; Johnson v. M'Intosh, supra*. In *New Jersey v. Wilson, supra*, the Indians had abandoned the land in question and the only issue was whether the land was still non-taxable. Justice Baldwin's comments in *Cherokee Nation, supra*, also refer to the fact that, although the states were "seized in fee," the states' interests were subject to the Indian rights of occupation. Finally, in *Mitchel, supra*, the Court was analogizing to certain decisions holding that state land grants would be held valid as to land within the States, but invalid as to lands in Indian country. In the cited decisions, however, *Winn v. Patterson*, 34 U.S. (9 Pet.) 663 (1835); *Danforth v. Wear*, 22 22 U.S. (9 Wheat.) 673 (1824); *Patterson v. Jenks*, 27 U.S. (2 Pet.) 216 (1829), not only did all of the state land grants predate the Indian Trade and Intercourse Act of 1790, but one of the decisions, *Danforth v. Wear, supra*, made clear that even as to those transactions the state's interest could only be conveyed subject to the extinguishment of Indian title. Thus, the early

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[16]The story of Justice McLean's dispute with Chief Justice Marshall, and the ultimate victory of the latter's views, may be found in M. Price, Law and the American Indian 40-68 (1973).

decisions of the Supreme Court do not support the State's position that the Nonintercourse statute applied solely in Indian country.

We turn then to the two most recent opinions bearing upon this subject, each of which contains language providing some support for the positions urged by the two parties in this appeal. In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), the Court held that there was federal jurisdiction to hear a claim for ejectment based upon Indian title, since that title rested upon federal law. In the course of its opinion, the Court noted that:

> The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13. It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the preemptive right to purchase from the Indians, was in the State, *Fletcher v. Peck*, 6 Cranch 87, 3 L.Ed. 162 (1810). But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law.

414 U.S. at 670 (footnote omitted).

Most recently, in *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979), the Court held that the present-day descendant of section 22 of the 1834 Act, which establishes the burden of proof in land disputes between Indians and "a white person," did not apply to a suit between the State of Iowa and an Indian tribe. As one of the reasons in support of its conclusion, the Court noted that the original section 22 was incorporated into the 1834 Act which, according to the Court, was meant to apply only "to the

whole Indian country." 442 U.S. at 667, quoting H.R. Rep. No. 474, 23d Cong., 1st Sess. 10 (1834). Thus, the *Wilson* court believed that in adopting section 22, the Congress had in mind only land disputes arising outside the jurisdiction of any state.

Although the district court found *Oneida's* language more closely on point than *Wilson's*, we believe that neither is determinative here. Regardless of whether the quoted language from *Oneida* is dictum or not, it suggests only that all Indian land transfers were subject to federal control and that extinguishment of Indian title is a federal question. It does not necessarily hold that the specific provisions of the Nonintercourse statute applied to all of those transfers. Instead, it would be consistent with *Oneida* to hold, as the State argues, that land transfers in Indian country were to be governed by the statute, but that the exclusion of eastern lands from the Nonintercourse statute meant that the "federal law" as to those lands was to allow the states to purchase them.

At the same time, *Wilson* does not persuade us to find that the Nonintercourse statute was so limited. *Wilson* involved the construction of a provision enacted independently of other Indian legislation and added to the Trade and Intercourse Act in 1834. Once again, it must be recalled that section 29 of the 1834 Act provided that the 1802 Act would remain in effect with respect to tribes located east of the Mississippi. Thus, while section 22, relating to the burden of proof in land disputes, may have been meant to apply only within the Indian territory specified in section 1 of the 1834 Act, there is no reason to conclude that the Nonintercourse statute, contained in both the 1802 and 1834 Acts, was also so limited. Nothing in *Wilson* reflects at all upon the geographic applicability of the previous Trade and Nonintercourse Acts, and therefore, even if it were to be held that the 1834 Nonintercourse statute was limited territorially, the Nonintercourse statute contained in the 1802

Act remained applicable by virtue of section 29 of the 1834 Act to the tribes east of the Mississippi.[17]

We conclude that the case law does not support the State's contention that we should ignore the plain language of the statute and limit the Nonintercourse statute's applicability. Moreover, while no case is controlling on the issue, *Oneida* does make clear that the extinguishment of all Indian title was meant to be a matter of federal concern. Since we have found no evidence that Congress intended to treat eastern Indian lands in a different manner, it would seem reasonable to believe that Congress intended a unified federal policy toward land acquisition from the Indians. In any event, we find nothing in the case law which dissuades us from or conclusion that Congress intended the Nonintercourse statute to apply throughout the United States.

V. "SURROUNDED BY SETTLEMENTS" EXCEPTION

As we conclude that the Nonintercourse statute was intended to apply to lands throughout the United States, we must consider the State's contention that the "surrounded by settlements" exception was intended to exempt from the various provisions of the Trade and Intercourse Acts transactions, including those involving land, with Indians residing in the settled areas of the eastern States. The district court disposed of this issue by adopting the view put forth in *Narragansett Tribe v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798, 808-09 (D.R.I. 1976). 483 F. Supp. at 599, n.9. In *Narragansett*, the district court held that the "surrounded by

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[17]We are aware that, after the *Wilson* decision was announced, the Solicitor General filed a motion for modification of the *Wilson* opinion, fearing that, by the language in *Wilson*, the Supreme Court had inadvertently foreclosed the various Indian eastern land claims. This motion was denied. Nevertheless, we do not believe this was a decision on the merits of the claims. The Court may have thought, as we do, that its opinion did not foreclose those claims.

settlements" exception applied only to trade with *individual* Indians who had left their tribes and chose to reside in non-Indian settlements. This interpretation was also accepted by the district court in *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd on other grounds sub nom. Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575 (1st Cir.) *cert. denied*, 444 U.S. 866 (1979).

We find this issue more troublesome than did the district court. It accepted the reasoning of *Narragansett* that the exception applied only to individual Indian land transactions because the exception was eliminated in the 1834 Act at the same time that the Nonintercourse statute was amended to exclude coverage of land transactions with individual Indians. 418 F. Supp. at 808-09. There are difficulties with this reading of the exception. The most serious one would seem to be that there is no necessary connection between the elimination of the exception, which did not contain any language suggesting that it was an exception solely to the Nonintercourse statute itself. Indeed, the exception provided for "trade and intercourse" with Indians surrounded by non-Indian settlements, and thus, it must have applied to the trade and intercourse provisions as well. Yet examination of the 1834 Act reveals that the Act continued to proscribe certain types of transactions even with individual Indians or upon property owned by individual Indians. *See, e.g.*, § 7 ("purchase or receive of any Indian"); § 9 ("on any land belonging to any Indian or Indian tribe"); § 20 ("sell . . . any spiritous liquor or wine to an Indian").

Further doubts about the *Narragansett* court's approach are rasied by considering the origin of the "surrounded by settlements" exception. The exception derived from a proviso in section 1 of the original 1790 Act. That proviso stated that "the President may make such order respecting the tribes surrounded in their settlements by the citizen of the United States, as to secure an intercourse without license, if he may deem it proper." While in subsequent Acts, the exception

stated merely that it applied to transactions "with Indians," it does not appear that Indian *tribes* surrounded by settlements were meant to be excluded. Indeed, the term "Indians" standing alone in the Acts has generally been interpreted to include both individual Indians as well as Indian tribes. *Wilson, supra*, 442 U.S. at 665-66.[18] It thus appears that the exception was meant to apply to transactions both with individual Indians and with tribes whenever either was situated on lands surrounded by non-Indian settlements.

While these considerations suggest that the district court was incorrect in its reading of the exception, they do not compel acceptance of the State's position that the exception was intended to exclude land transactions by eastern tribes. Instead, we find most persuasive the position advanced here by the Mohegan Tribe: that the "surrounded by settlements" exception was not meant to apply to land transactions at all. As just noted, the exception first appeared as a proviso in the first section of the 1790 Act. That section required that all "trade and intercourse" with Indian tribes be undertaken only by those possessing licenses from the federal government. The land provisions, which applied at the time to both individual and tribal lands, were contained in a separate section. In subsequent Acts, the only change was to place the exception in a separate section. Thus, it would appear that no substantive changes were intended by this alteration beside the important one of withdrawing the matter from Presidential discretion and making it mandatory. Moreover, the change from "tribes" in

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[18]Moreover, in other sections of the Acts the term "Indians" is used when Congress clearly intended to refer to Indian tribes. For example, in certain of the Nonintercourse statutes themselves a proviso states that "it should be unlawful for the agent or agents of any state, who may be present at any treaty held with *Indians*, under the authority of the United States . . . to adjust with the Indians, the compensation to be made, for their claims to lands with such state . . . ." (Emphasis supplied.) Treaties were made only with Indian tribes, not with individual Indians.

the 1790 Act to "Indians" in subsequent Acts is explained simply by the fact that section 1 of the 1790 Act itself applied only to trading with "the Indian tribes," while the subsequent Acts also restricted certain types of trade with individual Indians. *See, e.g.*, § 6 of the 1793 Act and §§ 9-10 of the 1796 Act.

The land provisions of the Acts, however, always remained distinct from those regulating "trade and intercourse." Thus, it appears that the "surrounded by settlements" exception was meant to apply only to the latter. The elimination of the exception in the 1834 Act is more plausibly explained by the fact that the 1834 Act specifically limited its trade restrictions to Indian country, *see e.g.*, §§ 2, 6, 7, although once again, it must be recalled that section 29 of the 1834 Act continued in effect those provisions of the 1802 Act applicable to tribes east of the Mississippi. Thus, the exception would seem to have remained applicable to trade and intercourse with certain of the eastern tribes, but not to any land transactions with the states. That the 1834 Act eliminated land transactions with individual Indians from the coverage of the Act is of no significance.

We agree with the district court that the Nonintercourse statute was not intended to be applicable solely in Indian country. We also hold that the "surrounded by settlements" exception was not meant to apply to Indian land transactions. The order denying defendant's motion to dismiss is affirmed.

APPENDIX B

DISTRICT OF CONNECTICUT

MOHEGAN TRIBE	:	
v.	:	CIVIL NO. H-77-434
STATE OF CONNECTICUT	:	

RULING ON MOTION TO DISMISS

This is a civil action for possession of land now allegedly owned and used by the State of Connecticut. The plaintiff, the Mohegan Tribe of Indians, claims that certain lands located in the northeast portion of the Town of Montville, Connecticut were "from time immemorial . . . until [the] defendant's predecessor-in-title . . . purported to claim title to the [land], exclusively owned, used, and occupied" by the Mohegans. It further claims that the property was held by the Tribe at the time of the enactment of the first Indian Trade and Intercourse Act in 1790. Act of July 22, 1790, ch. 33, 1 Stat. 137 ("1790 Act"). That act and its successors provided, in part, that conveyances of Indian land to non-Indians would be invalid unless made by treaty under the authority of the United States.[1] Since the Indians held the land at the time of the Act and since no federal treaty has ever been made with them, they claim that the land is rightfully theirs.

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[1]In this opinion, the court refers to the Indian land transfer provision, currently codified at 25 U.S.C. § 177, as the "Nonintercourse" statute. The Nonintercourse statute was always enacted along with other Indian statutes, the whole body of which will be referred to herein as the "Trade and Intercourse Act" or more simply as the "Act." While the Nonintercourse statute prohibited certain land transactions with Indians, the remaining provisions of the Trade and Intercourse Act swept more broadly. At different times the Act has regulated trade in such diverse products as whiskey, guns, horses, and pots and pans, as well as jurisdiction for criminal prosecutions. It is currently codified in Titles 25 and 26 of the United States Code.

Connecticut has filed a motion to dismiss this action. It bases its motion on a claim that the Trade and Intercourse Acts were not intended to apply to Indian tribes which were located to the east of the "Indian country" borderline. That borderline was defined for the first time in the 1834 enactment of the Trade and Intercourse Act,[2] *but it is conceded that at no time between 1790 and the present have the Mohegans been residents of "Indian country." If, as the State contends, the Nonintercourse statute applied only in Indian country, the case should be dismissed.*

The current Nonintercourse statute, 25 U.S.C. § 177, and its predecessors, are all put in issue by the plaintiff's complaint and the defendant's answer. Since each reenactment of the Nonintercourse statute was primarily based on the language of the prior statute, however, the proper starting point for any inquiry lies in the original 1790 Act. It provided in pertinent part that:

> "no sale of lands made by any Indians, or any nation or tribe of Indians, *within the United States*, shall be valid to any person or persons, or *to any state*, whether having the right of preemption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States."

1790 Act, § 4 (emphasis added). The Act of March 1, 1793, ch. 19, 1 Stat. 29 ("1793 Act"), which supplanted the 1790 Act, provided:

> "That no purchase or grant of lands, or of any title or claim thereto, from any Indians, or nation or tribe of Indians, *within the bounds of the United States*, shall

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[2] Act of June 30, 1834, ch. 161, § 1, 4 Stat. 729.

> be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution: . . . [I]t shall be lawful for the agent or agents of any State . . . under the authority of the United States, . . . to propose to, and adjust with the Indians, the compensation for their claims to lands within such States . . . ."

1793 Act, § 8 (emphasis added). Because of a section in the 1793 Act which provided that the entire Act was to expire automatically after approximately two years,[3] the legislature reenacted the same Act in 1796.[4] With essentially the same language, the Act was again reenacted in 1799[5] and 1802.[6]

In 1834, the Nonintercourse statute took on the shape which it has had to present day.[7] With only one relevant exception, the language of the section on land conveyances is identical to the language in the corresponding section of the 1793 Act. The only exception is the ommission of the words "within the bounds of the United States." These words do not appear inthe 1834 Act and since then no geographic limitation whatsoever has replaced them.

In spite of the fact that the Nonintercourse statute was enacted five times with the explicit words "within the United States" and still contains no explicit limitations, the defendant insists that the statute should be read as limited solely to "Indian country." Connecticut bases this claim on the legislative intent and history lying behind the Trade and Intercouse

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[3]1793 Act, § 15.

[4]Act of May 19, 1796, ch. 30, 1 Stat. 469 ("1796 Act").

[5]Act of March 3, 1799, ch. 46, 1 Stat. 743 ("1799 Act").

[6]Act of March 30, 1802, ch. 13, 2 Stat. 139 ("1802 Act").

[7]Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729 ("1834 Act").

Acts and on other sections of the Acts which do contain express geographic limitations.

Resolution of this motion only requires the court to construe the Nonintercouse statute. Arguments over the meaning of this short, three-sentence provision, however, have generated in excess of 300 pages of briefing, extensive research, and elaborate appendices. The arguments advanced by both parties can be grouped into three categories. Some are based on the language of the Acts themselves, some are based on their historical context, and others are based on prior case law. This opinion considers each of these three sets of arguments separately.

The Language of The Act

In a case involving the interpretation of a statute, analysis must begin with the language of the statute itself. *Touche Ross & Co. v. Redington*, 47 U.S.L.W. 4732, 4734 (U.S. June 19, 1979). The language of the Trade and Intercourse Acts does not support the defendant's motion. In addition to the explicit references to "within the bounds of the United States" found in the land conveyance section, the language of several other sections in these Acts suggest that their application is not limited to Indian country.

For instance, from 793 until 1834, every Act contained a "surrounded by settlements" provision.[8] Under this provision, the terms of the Act were not "to be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States and being within the ordinary jurisdiction of any of the individual

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[8]1802 Act, § 19; 1799 Act, § 19; 1796 Act, § 19; 1793 Act, § 13.

States . . . ."[9] At the time, there were no such surrounded Indians in the area defined as Indian country. If, as the defendant contends, the *entire* Trade and Intercourse Act was to apply only to Indian country, it would have served no purpose to *exempt* Indians living *outside* Indian country. It must be assumed that Congress knew what it was doing when it enacted the Act; this court is not inclined to give the Act an interpretation which will render portions of it meaningless. *Reiter v. Sonotone Corp.*, 47 U.S.L.W. 4673, 4674 (U.S. June 11, 1979); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

Another rule of statutory construction also lends support to the plaintiff's position. In 1802, Congress added section 21 to the Act, which provided:

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[9]Defendant has also advanced an argument based on these sections. Connecticut claims that by their express terms these sections exclude Indians surrounded by white citizens from the protection of the Trade and Intercourse Acts. Thus, since the Mohegan Tribe had been surrounded by white citizens since well before 1790, Connecticut argues, it never was entitled to the protection of the Nonintercourse statute.

The flaw in this argument, however, stems from reading the word "Indian" in these sections to include Indians living in tribal communities. As one court has recently stated:

> "At the time that this proviso was a part of the Act, the terms of the Act applied in land of 'any Indian' as well as to that of any 'nation or tribe of Indians.' The provision was repealed in 1834, . . . at the same time that transactions by individual Indians were removed completely from the coverage of the Act . . . . Thus the most logical interpretation of the proviso is the one which is also the most consistent with the rules of construction governing statutes relating to Indians . . . : the proviso was addressed to transactions by individual Indians living in 'white' settlements and has no application to land to which a *tribal* right of occupancy is claimed."

Narragansett Tribe v. Southern Rhode Island Land Development Corp., 418 F. Supp. 798, 808-809 (D.R.I. 1976).

> "That the President of the United States be authorized to take such measures, . . . to prevent or restrain the vending or distributing of spirituous liquors *among all or any of the said Indian tribes*, ..."
>
> (Emphasis added).[10]

In 1822, however, Congress deemed it advisable to amend this section so as to limit its applicability to Indian country:

> "That it shall and may be lawful for the President of the United States, in execution of the power ves ed in him by the *twenty-first section* of the act of the thirtieth of March, one thousand eight hundred and two, aforesaid, [the Trade and Intercouse Act] *to which this is an amendment*, to direct . . . [certain persons] to cause the stories and packages of goods of all traders to be searched, upon suspicion or information that *ardent spirits are carried into the Indian countries* by said traders *in violation of the twenty-first section of the act to which this is an amendment* . . . ."
>
> (Emphasis added).[11]

"It is a canon of statutory construction that where, as here, the words of a later statute differ from those of a previous one on the same or a related subject, the legislature must have intended them to have a different meaning." *Klein v. Republic Steel Corporation*, 435 F.2d 762, 765, 766 (3d Cir. 1970). Thus, it seems unlikely that the 1822 amendment would have been necessary had the 1802 Act been entirely limited to Indian country. On the contrary, the logical conclusion to draw from

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[10]1802 Act, § 21.

[11]Act of May 6, 1822, ch. 58, 3 Stat. 682.

this amendment is that when Congress wanted to limit the effect of a particular provision it was quite aware of how to do so.

In addition to these provisions, the specific provision concerning land transfer has a clue to its geographic applicability imbedded within it. Under the terms of every Act enacted after 1790, the "agents of States" were allowed to negotiate with Indians (under federal auspices) for claims to lands "within such States."[12] This makes it clear that the Nonintercourse statute was meant to apply within state boundaries. Defendant apparently concedes as much, but it points out that the boundary to Indian country ran through the western parts of some of the original 13 states. Thus, it claims that this proviso was meant to apply to land which was both in Indian country and within the boundaries of states. While this argument sustains the state's position for some of the earlier Acts, the 1834 Act, which contains the same proviso, expressly indicates that Indian country lies only outside of states.[13] It is therefore logically impossible to conclude both that the Act was meant to apply within the boundaries of a state, a conclusion mandated by the express language of the provision, and that the Act applied only to Indian country, a conclusion drawn by the defendant. This, then, is further strong support for the plaintiff's position.

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[12]1834 Act, § 12; 1802 Act, § 12; 1799 Act, § 12; 1796 Act, § 12, 1793 Act, § 8.

[13]"That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas and, also, that part of the United States east of the Mississippi river, and not within any State to which Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country." 1834 Act, § 1.

In order better to understand the awkward language of this section, it is helpful to insert a comma following the phrase "and not within any State." Such an insertion is in accord with the intended meaning of the section.

In opposition to these arguments, the defendant can muster only paltry support from the language of the Act. For instance, it argues that the title of the Act, "Act to Regulate Trade and Intercourse with Indian Tribes and to Preserve Peace on the Frontiers," suggests that the Act was solely designed to govern relations with frontier tribes. But, for whatever significance should be given to the title,[14] it is perhaps more accurate to say that it describes two objectives, only one of which dealt exclusively with frontier tribes. Moreover, the titles to the 1790 and 1793 Acts did not contain the "Peace on the Frontier" language upon which the defendants rely, even though they did include the restrictions on land convenances at issue here.

Defendant also argues that the extensive delineation of a boundary line in the Act must signify that the entire Act was to

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[14] "[H]eading and title are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis. Where the text is complicated and prolific, headings and titles can do no more than indicate the provisions in a most general manner; to attempt to refer to each specific provision would often be ungainly as well as useless. As a result, matters in the test which deviate from those falling within the general pattern are frequently unreflected in the headings and titles. Factors of this type have led to the wise rule that the title of a statute and the heading of a section cannot limit the plain meaning of the text. *United States v. Fisher*, 2 Cranch 358, 386; *Cornell v. Coyne*, 192 U.S. 418, 430; *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348, 354. For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt. But they cannot undo or limit that which the text makes plain.

Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 528-29 (1947). *See also* United States v. Roemer, 514 F.2d 1377, 1380 (2d Cir. 1975) ("[B]asic principle of statutory construction . . . gives precedence, in the event of irreconcilable conflict, to words in the body of a provision over those in a caption.").

apply only in the demarcated territory. Otherwise Connecticut claims, the existence of a boundary line would be meaningless. The answer to this is obvious. Some sections of the Act expressly proscribed certain activities in "Indian country." For those sections, a definitive boundary line was important. Other sections, not limited to Indian country by their terms, need not be given limited geographical applicability in order to ascribe meaning to the boundary line. It is no more persuasive to say that the mere existence of a boundary line in a statute means that all of the provisions of that statute are applicable only within the boundary, than it is to say that Congress' failure explicitly to limit the provisions of the entire Act to Indian country proves the contrary.

Finally, defendant argues that "boundary line" language found in the 1796-1802 Act suggests that the entire Act was to be limited to Indian country. Defendant emphasizes the following closing proviso:

> "[I]f the boundary line between the said Indian tribes and the United Sttes shall at any time hereafter, be varied, by any treaty . . . then *all the provisions* contained in this act shall be construed so as to apply to the said line so to be varied . . . ."[15]

Defendant would have the court ignore, however, the language obscured in the final ellipsis. The statute continues:

> ". . . in the same manner, as said provisions apply, by force of this act, to the boundary line hereinbefore."

In other words, where the boundary line as described in the Act is applicable to a particular provision, an amended boundary will also apply. If it suggests anything, however, the language

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[15]1802 Act, § 1; 1799 Act, § 1; 1796 Act, § 1 (emphasis added).

tends to suggest that the "manner" in which the boundary line applies to various provisions may not be uniform section-to-section throughout the Act.

In short, the language of the Act — both that of the particular land conveyance section and that of the Act as a whole — does not support the defendant's position. On their face, the Trade and Intercourse Acts and the Nonintercouse statutes clearly apply everywhere "within the bounds of the United States," in Indian country and elsewhere.

Legislative History and Historical Context

Because of the apparent clarity of the statutory language, plaintiff argues that reference to legislative history is inappropriate. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 201 (1976). As the Supreme Court has noted, however, " '[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." ' " *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 10 (1976), *quoting United States v. American Trucking Ass'n.*, 310 U.S. 534, 543-44 (1940) (footnotes omitted). Ultimately, the objective of the court in construing a particular statute is to "ascertain the congressional intent and give effect to the legislative will," *Philbrook v. Glodgett*, 421 U.S.707, 713 (1975), and while legislative intent is best gleaned from the text of the statute itself, *AFL-CIO v. Marshall*, 570 F.2d 1030, 1036 (D.C. Cir. 1978); *Patagonia Corp. v. Board of Governors of Federal Reserve System*, 517 F.2d 803, 813 (9th Cir. 1975), the court should not be loathe to probe beneath the surface in its search for underlying intent.

Consequently, this Court has gone beyond the language of the statute and has carefully examined the historical arguments advanced by the defendant. These arguments have been elaborately presented in meticulous briefs with extensive appen-

dices and center on three general themes.[16] First, the defendant presents evidence which it claims shows that the Nonintercourse statutes were enacted merely as a continuation of the limited Indian act passed under the Articles of Confederation. Second, the defendant argues that the Acts were enacted solely to secure treaty rights and to preserve peace in the frontier; and finally, the defendant points to an extensive compilation of jurisdictional history which suggests that the executive branch of the government, throughout the 19th century, treated the Trade and Intercourse Acts as applicable solely to Indian country.

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[16]In addition to arguments based on a more generalized history of Indian relations, the defendant has unearthed one fragment of "legislative history," as that term is generally used. In a report accompanying three bills, one of which dealt with the enactment of the 1834 Trade and Intercourse Act, the Committee of Indian Affairs of the House of Representatives stated that:

> "This bill is intended to apply to the whole Indian country . . . ; it will continue to embrace only those sections of country not within any State . . . ."

H.R. Rep. No. 474, 23d Cong., 1st Sess. 10 (1834).

While this quote has some probative value, its importance was minimized when, after the report was issued, an amendment offered by Senator Frelinghuysen was adopted on the floor of the Senate. Frelinghuysen, a bitter opponent of President Jackson's policy of removing Indian tribes to the west of the Mississippi, was able to insert a protective proviso in the 1834 Act. The proviso declared that the repeal of the 1802 Act by the 1934 enactment could not

> "impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi."

1834 Act, § 29.

Apart from the quote discussed above, legislative history on the precise question before the court is not helpful. As the State of Maine, amicus curiae, has indicated:

> "Congressional debates and committee reports on the territorial applicability of the Acts are, admittedly, scanty."

Both parties appear to concede that the Continental Congress, which operated under the Articles of Confederation, enacted a proclamation governing relations with Indians which explicitly left to the States the right to govern Indian affairs within their boundaries.[17] In fact, the Continental Congress had no other choice, for the Articles of Confederation conferred no greater powers on it.[18] Both parties also agree that the Constitution, as it finally became effective in 1789, greatly expanded the powers of the government to deal with Indians.[19] The dispute between the parties arises over the extent to which Congress chose to exercise its new-found powers. Defendant argues that since the post-Constitution Congress was faced with the same problems and was composed of many of the same individuals as the Continental Congress, it only intended to exercise its powers to the same extent as they previously had been exercised. This, however, is hardly an automatic conclusion. A legislature constrained by an exceedingly weak grant of authority will not necessarily exhibit a similar degree of self-restraint when the external constraints are removed.[20] Nor is there such a similarity of language between the proclamation of the Continental Congress and the 1790 Act as would make the

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[17]1 Laws U.S. 607-608.

[18]Articles of Confederation, Article IX.

[19]U.S. Const., art. I, § 8, cl. 3 provides:

> "The Congress shall have Power To . . . regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes . . . ."

[20]In fact, several contemporaries suggested the contrary. When George Washington spoke to the Seneca tribe of New York Indians in 1790 he stressed to them that the United States Constitution and subsequent acts of Congress represented a significant change from the previous situation.

> "I must inform you that these evils arose before the present Government of the United States was established, when the separate States, and individuals under their authority, undertook to treat with the Indian tribes respecting the sale of their lands. *But the case is now entirely*

defendant's construction appear likely. The proclamation applied "without the limits or jurisdiction of any particular State," while the Nonintercourse statute of 1790 was expressly made applicable "within the United States." As the Court of Appeals for the First Circuit has noted in a slightly different context:

> "[W]e find an inclusive reading consonant with the policy and purpose of the Act. That policy has been said to be to protect the Indian tribes' right of occupancy, even when that right is unrecognized by any treaty, *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 345, 347, 62 S.Ct. 248, 86 L.Ed. 260 (1941), *rehearing denied*, 314 U.S. 716, 62 S.Ct. 476, 86 L.Ed. 570 (1942), and the purpose to prevent the unfair, improvident, or improper disposition of Indian lands, *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 119, 80 S.Ct. 543, 4 L.Ed.2d 584, *rehearing denied*, 362 U.S. 956, 80

> *altered;* the General Government, only, has the power to treat with the Indian nations, and any treaty formed, and held without its authority, will not be binding."

4 American State Papers 142 (1 Indian Affairs, 1832) (emphasis added).

Chief Justice Marshall put it more directly in his opinion for the Court in Worcester v. Georgia, 31U.S. (6 Pet.) 515, 559 (1832):

> "The correct exposition of this article [in the Articles of Confederaton] is rendered unnecessary by the adoption of our existing constitution. That instrument confers on congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions; the shackles imposed on this power, in the confederation, are discarded."

> S.Ct. 858, 4 L.Ed.2d 873 (1960); *United States v. Candelaria*, 271 U.S. 432, 441, 46 S.Ct. 561, 70 L.Ed. 1023 (1926). Since Indian lands have, historically, been of great concern to Congress, *see Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974), we have no difficulty in concluding that Congress intended to exercise its power fully."

Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370, 377 (1st Cir. 1975).

Connecticut has also collected a vast array of historical writings and records which demonstrate that George Washington and Henry Knox, two of the primary architects of the Trade and Intercourse Acts, were principally concerned with placating the frontier Indians and minimizing friction on our young nation's western borders. This, of course, is undeniable, and the plaintiff does not contend otherwise. This court, however, finds it worthy of some note that in spite of the extensive research efforts by the defendant and the State of Maine, as amicus, neither have been able to unearth any writings which establish that peace on the frontier and the maintenance of treaty obligations were the *sole* objectives of the legislation. But no other reasons are given to speculate.

It is particularly difficult to understand why there is no language from the sponsors of the Act designed to reassure individual states that their prerogatives in Indian affairs were not being changed, when the Act, on its face, appeared to sweep so broadly. The historical backdrop for the enactment of these Acts is dominated by conflicts between those who favored a strong central government and those who favored maintaining maximum state autonomy. Certainly, passage of the Acts would have been expedited had George Washington or other advocates of the measures been able to minimize the

extent of "states-rights" opposition. Nonetheless, no such language has been brought to the court's attention.

Nor is it inconceivable that Washington's plan to preserve peace on the frontiers included concessions to Eastern Indians as some evidence of the United States' sincerity of purpose. As early as 1790, George Washington was addressing frontier tribes in an effort to convince them that the national approach to Indian affairs had changed.[21] Statutes which demonstrated a genuine intent to end the evils associated with encroachment on Indian land wherever situated would be substantial evidence of such a change.

Thus, while the history as presented by the defendant may have some probative value, it is not without ambiguity. The court is mindful of the principle that statutes are generally to be construed in light of the mischief to be remedied, *Liberation News Service v. Eastland*, 426 F.2d 1379, 1383 (2d Cir. 1970), but such an admonition is difficult to follow where the specific "mischief" is difficult to identify.

Finally, Connecticut and the State of Maine, as amicus, have developed an extensive argument based on "jurisdictional history." Jurisdictional history is a tool which is sometimes used to establish the meaning of a statute by determining which entities assert jurisdiction after a statute is enacted. While a history of such interaction is significant and lends some credence to the defendant's motion, extensive reliance on jurisdictional history under the circumstances in this case is inappropriate. Here, instead of a dispute where daily behavior can be said to have established a general understanding, this case involves a handful of land "sales" concluded over a hundred years ago. Neither the federal government's failure to

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[21]4 American State Papers 142 (1 Indian Affairs, 1832) (Speech to Seneca Indians of New York).

intervene and declare the sales void for the efforts of Connecticut to extinguish Indian title without federal approval in the late 18th or early 19th centuries can be said to have established the meaning of 25 U.S.C. § 177 and its predecessors.

In fact, one court recently faced with a claim under 25 U.S.C. § 177, a claim which was far more conducive to proof by jurisdictional history than is the claim in this case,[22] found that even virtually uninterrupted exercise of state jurisdiction could not alter the federal government's role as envisioned in the statute. In *Joint Tribal Council of Passamaquoddy Tribe v. Morton, supra*, the State of Maine placed before the First Circuit virtually the identical arguments it raises here as amicus in an effort to convince that court that the statute did not provide for a federal trust relationship with the Passamaquoddy Indian tribe. In spite of the fact that all of the jurisdictional history was to the contrary, the First Circuit concluded that the federal government's fiduciary status with respect to the protection of Indian lands was established "beyond question. . . . from the history, wording and structure of [25 U.S.C. § 177] . . . ." 528 F.2d at 379. It noted further that "[t]he reasons behind Congress' inaction are too problematical for the matter to have meaning for purposes of statutory construction." *Id.* at 378.

Thus, while the defendant's historical arguments may cast some doubt on the meaning of the statute, they, at best, add a

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[22]In Joint Tribal Council of Pasamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975), the issue was whether the United States had a "trust relationship" with the Passamaquoddy Indian tribe. The tribe claimed that the Nonintercourse statute created a fiduciary relationship. Unlike a handfull of land sales, a trust "relationship" necessarily implies repeated and numerous contacts between the guardian and its ward, and would therefore appear to be more amenable to proof by jurisdictional history than is the claim advanced by the defendants here.

shade of ambiguity to an otherwise relatively unambiguous statute. As one court has noted: "the plainer the language, the more convincing contrary legislative history must be." *United States v. United States Steel Corp.*, 482 F.2d 439, 444 (7th Cir.), *cert. denied*, 414 U.S. 909 (1973). When considered in light of the Supreme Court's admonition that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful constructions being resolved in favor of the Indians," *Wilson v. Omaha Indian Tribe*, 47 U.S.L.W. 4758, 4761 (U.S. June 20, 1979), it is clear that the defendant has failed to carry its burden of establishing a contrary legislative history sufficient to overcome the apparent meaning of the statute, discernable from the language of the Act alone.

Case Law

Both parties insist that the relevant case law on this issue substantiates their claims, and both set forth exhaustive discussions of early 19th century cases as well as opinions rendered in the last decade. In spite of extensive searches by both parties, however, there is apparently no reported opinion which specifically rules on the geographic applicability of the land transfer section of the Trade and Intercourse Act. In other words, this precise issue appears to be a question of first impression.[23]

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[23]Several other courts have come very close to deciding this issue. In Oneida Indian Nation v. County of Oneida, 434 F. Sup. 527, 540 (N.D.N.Y. 1977), *on remand from* 414 U.S. 661 (1974), Judge Port noted that the Nonintercourse statute applied in New York in spite of the facts that New York was one of the original 13 states. That case does not necessarily resolve the issue here since the Oneida Indian Nation had the benefit of a federal treaty and may have been located to the west of the "Indian country" boundary lines during the early 1790's.

In Narragansett Tribe v. Southern Rhode Island Land Development Corp., *supra* at 803, 804, Chief Judge Pettine appears implicitly to have resolved the question in favor of the Indians, although it is not clear that the issue was directly presented by the parties.

While the early Supreme Court cases are of some assistance in resolving this particular question, they are difficult to decipher and even more difficult to apply. Most do not even discuss the Nonintercourse statutes and focus instead on constitutional and jurisprudential concepts. Moreover, the florid style of the early opinions converts many of them into "litigant[s'] wishing-well[s] into which, it sometimes seems, one may peer and find nearly anything he wishes." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 273 (2d Cir. 1979).

Fortunately, however, this court need not wade through the dense prose of this country's earliest jurists, for this task has already been done by Justice White in his opinion for the Court in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-78 (1974). There, after an extensive review of prior case law, the Court concluded:

> "It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign — first the discovering European nation and later the original States and the United States — a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. This the United States did with respect to the various New

> York Indian tribes, including the Oneidas. The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that 'no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.' This has remained the policy of the United States to this day. See 25 U.S.C. § 177.
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> ". . . .
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> "*The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13.* It is true that the United States never held fee title to the Indian lands in the original States as it did to almost all the rest of the continental United States and that fee title to Indian lands in these States, or the preemptive right to purchase from the Indians, was in the State, *Fletcher v. Peck*, 6 Cranch 87 (1810). But this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law."

Id. at 667, 668, 670 (footnotes omitted) (emphasis added).

It is true that the precise issue raised here was not before the Court in *Oneida*. There, the Oneida Indian Nation had filed a suit in federal court claiming a right to possession of lands and had based its claim, as do the Indians here, on 25 U.S.C. § 177. The defendants in *Oneida* moved to dismiss the action on the grounds that the court lacked federal question jurisdiction. Under the "well-pleaded complaint" doctrine the test which the Supreme Court applied was whether the Indians' claim was

not "so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy within the jurisdiction of the District Court . . . ." *Id.* at 666. In resolving this question the Court concluded:

> "*given the nature and source of the possessory rights of Indian tribes to their aboriginal lands*, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of both § 1331 and § 1362."

Id. at 667 (emphasis added). Thus, where the Supreme Court apparently needed only to conclude that the Indians asserted a colorable claim, its discussion went further and virtually settled the question of the geographical applicability of 25 U.S.C. § 177.

To this extent, the Supreme Court language may be considered dictum, as the defendant suggests, since its reach was further than required under the circumstances. Nonetheless, it was necessary for the Court at least to consider the Indians' claim, the territorial applicability of 25 U.S.C. § 177, and the question whether section 177 applied outside of Indian country. The latter question was explicitly put in issue by the brief and argument of one of the litigants before the Court. At worst, then, the explicit discussion of the Supreme Court in *Oneida* is reasoned dictum. Contrary to Connecticut's argument, the mere fact that the language might be considered dictum does not permit this court to "cavalierly disregard it . . . . While such dictum is not binding upon [the court], it must be given considerable weight and can not be ignored in the resolution of the close question [this court has] to decide." *United States v. Bell*, 524 F.2d 202, 206 (2d Cir. 1975); *see Warren v. Harvey*, 472 F. Supp. 1061, 1072 (D.C. Conn. 1979). Since the *Oneida* opinion reaches the same conclusion that this court has

reached after considering the language and the history of the Act, the *Oneida* Court's analysis and conclusions based on prior case law provide substantial additional support for the plaintiff's position, if indeed, they are not controlling.[24]

Defendant argues that a very recent Supreme Court decision undercuts the force of the language in *Oneida*. In the case of *Wilson v. Omaha Indian Tribe, supra*, the Court, again by Justice White, reasoned that section 22 of the 1834 Trade and Intercourse Act was intended to apply solely in Indian country. Defendant argues that this is entitled to significance here because section 22, like the section on land conveyances, contains no express geographical limitations. Thus, the defendant argues, the Supreme Court has impliedly held that all sections of the Trade and Intercourse Acts are similarly limited.

While there may be some merit to the argument, this court does not attribute much significance to it. Section 22 deals only with a procedural rule which places the burden of proof on a "white person" in any civil dispute with an Indian over property. The precise question before the Supreme Court was whether the State of Iowa was a "white person" under the statute. In reaching the conclusion that Iowa was not a "white person," the Court did not have to rule that the Act applied only in Indian country. Unlike *Oneida*, the Court did not consider prior case law nor did it elaborate on this point. Throughout the opinion, *Oneida* is cited favorably with no hint that it was being overruled *sub silentio*.

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[24]On remand from the Supreme Court's decision in *Oneida, supra*, Judge Port concluded that the Supreme Court's language established the geographic applicability of 25 U.S.C. § 177. In other words, the Supreme Court's treatment of this question was not considered solely as dicta, but rather was treated as binding on the District Court. Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 540 (N.D.N.Y. 1977).

Furthermore, there is a noteworthy distinction between section 22 and the Nonintercourse section at issue here. Section 22, unlike most of the sections of the Trade and Intercourse Act, was first added to the Act as late as 1822. Unlike the land conveyance section, it is not based on prior provisions dating back to 1790, shortly after the ratification of the Constitution. In particular, unlike the land conveyance section, section 22 was not based on a history of prior enactments, each of which expressly indicated that the section was applicable throughout the United States.[25]

Therefore, for the reasons stated above, this court concludes that *Wilson v. Omaha Indian Tribe* has not altered the import of the Supreme Court's clear expression in *Oneida*. *Oneida*, with its summary of prior case law, stands as strong support for the plaintiff's position.

Conclusion

"For purposes of this motion [the court] may look only at the pleadings, with all of the 'well-pleaded material facts alleged in the complaint . . . taken as admitted' . . ., and the

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[25]Justice White himself was unwilling to extend the interpretation of the words "white person" in section 22 to any other section of the Act, in spite of the urging of two concurring members of the Court. The Court refused to do so because the other provision in the Act which used the words "white person," section 16, had a different and "distinct legislative history." Wilson v. Omaha Indian Tribe, *supra*, at 4761 n.16. Section 16, like the land conveyance section and unlike section 22, had predecessor provisions in every Act since 1790. Because the history of section 16 parallels that of the land transfer section at issue here, the Court's refusal to extend its ruling to section 16 based on a "distinct legislative history" is some evidence that the *Wilson* dictum should not be extended to other provisions of the Act.

complaint should not be dismissed 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp.*, 554 F.2d 551, 553 (2d Cir. 1977) (citations omitted). Since the Nonintercourse statute is applicable to the lands at issue here, it is clear that the complaint of the Mohegan Tribe does state a claim upon which relief may be granted. Therefore, the defendant's motion is denied.

SO ORDERED.

Dated at Hartford, Connecticut, this 17th day of January, 1980.

M. JOSEPH BLUMENFELD
United States District Judge

APPENDIX C

Act of 1790, ch. 33, 1 Stat. 137

SECTION 1. That no person should be permitted to carry on any trade or intercourse with the Indian tribes, without a license for that purpose, under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall appoint for that purpose; which superintendent, or other person so appointed, shall, on application, issue such license to any proper person, who shall enter into bond, with one or more sureties, approved of by the superintendent, or person issuing such licensing, or by the President of the United States, in the penal sum of one thousand dollars, payable to the President of the United States for the time being, for the use of the United States, conditioned for the true and faithful observance of such rules, regulations, and restrictions, as now are, or hereafter shall be, made for the government of trade and intercourse with the Indian tribes. The said superintendents, and persons by them licensed as aforesaid, shall be governed in all things, touching the said trade and intercourse, by such rules and regulations as the President shall prescribe. And no other person shall be permitted to carry on any trade or intercourse with the Indians, without such license as aforesaid. No license shall be granted for a longer term than two years: *Provided, nevertheless*, That the President may make such order respecting the tribes surrounded in their settlements by the citizens of the United States, as to secure an intercourse without license, if he may deem it proper.

SECTION 2. That the superintendent, or person issuing such license, shall have full power and authority to recall all such licenses as he may have issued, if the person so licensed shall transgress any of the regulations or restrictions provided for the government of trade and intercourse with the Indian tribes, and shall put in suit such bonds as he may have taken,

immediately on the breach of any condition in said bond: *Provided always*, That if it shall appear, on trial, that the person from whom such license shall have been recalled, has not offended against any of the provisions of this act, or the regulations prescribed for the trade and intercourse with the Indian tribes, he shall be entitled to receive a new license.

SECTION 3. That every person who shall attempt to trade with the Indian tribes, or be found in the Indian country with such merchandise in his possession as are usually vended to the Indians, without a license first had and obtained, as in this act prescribed, and being thereof convicted in any court proper to try the same, shall forfeit all the merchandise so offered for sale to the Indian tribes, or so found in the Indian country, which forfeiture shall be one half to the benefit of the person prosecuting, and the other half to the benefit of the United States.

Act of 1790, ch. 33, 1 Stat. 137 § 4.

SECTION 4. *And be it enacted and declared*, That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

SECTION 5. That if any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, shall go into any town, settlement, or territory, belonging to any nation or tribe of Indians, and shall there commit any crime upon, or trespass against, the person or property of any peaceable and friendly Indian or Indians, which, if committed within the jurisdiction of any State, or within the jurisdiction of either of the said districts, against a citizen or white inhabitant thereof, would be punishable by the laws of such State or district, such offender or offenders shall be subject to the same

punishment, and shall be proceeded against in the same manner, as if the offence had been committed within the jurisdiction of the State or district to which he or they may belong, against a citizen or white inhabitant thereof.

SECTION 6. That for any of the crimes or offences aforesaid, the like proceedings shall be had for apprehending, imprisoning, or bailing, the offender, as the case may be, and for recognizing the witnesses for their appearance to testify in the case, and where the offender shall be committed, or the witnesses shall be in a district other than that in which the offence is to be tried, for the removal of the offender and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had, as by the act to establish the judicial courts of the United States, are directed for any crimes or offences against the United States.

SECTION 7. That this act shall be in force for the term of two years, and from thence to the end of the next session of Congress, and no longer.

Act of 1793, ch. 19, 1 Stat. 329

SECTION 1. That no person shall be permitted to carry on any trade or intercourse with the Indian tribes without a license under the hand and seal of the Superintendent of the Department, or of such other person as the President of the United States shall authorize to grant licenses for that purpose; which Superintendent, or person so authorized, shall, on application, issue such license, for a term not exceeding two years, to any proper person, who shall enter into bond, with one or more sureties, approved of by the Superintendent, or person issuing such license, or by the President of the United States, in the panel sum of one thousand dollars, payable to the United States, conditioned for the true and faithful observance of such rules, regulations, and restrictions, as are or shall be made, for the government of trade and intercourse with the Indian tribes.

The said Superintendents, and persons licensed, as aforesaid, shall be governed, in all things touching the said trade and intercourse, by such rules and regulations as the President of the United States shall prescribe.

SECTION 2. That the Superintendent, or person issuing such license, shall have full power and authority to recall the same, if the person so licensed shall transgress any of the regulations or restrictions provided for the government of trade and intercourse with the Indian tribes; and shall put in suit such bonds as he may have taken, on the breach of any condition therein contained.

SECTION 3. That every person who shall attempt to trade with the Indian tribes, or shall be found in the Indian country, with such merchandise in his possession as are usually vended to the Indians, without lawful license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession in the Indian country, and shall, moreover, be liable to a fine, not exceeding one hundred dollars, and to imprisonments not exceeding thirty days, at the discretion of the Court in which the trial should be: *Provided*, That any citizen of the United States, merely traveling through any Indian town or territory, shall be at liberty to purchase, by exchange or otherwise, such articles as may be necessary for his subsistence, without incurring any penalty.

SECTION 4. That, if any citizen or inhabitant of the United States, or of either of the Territorial districts of the United States, shall go into any town, settlement, or territory, belonging to any nation or tribe of Indians, and shall there commit murder, robbery, larceny, trespass, or other crime, against the person or property of any friendly Indian or Indians, which, if committed within the jurisdiction of any State, or within the jurisdiction of either of the said districts, against a citizen thereof, would be punishable by the laws of such State or district, such offender shall be subject to the same punishment,

as if the offence had been committed within the State or district to which he or she may belong, against a citizen thereof.

SECTION 5. That, if any such citizen or inhabitant shall make a settlement of lands belonging to any Indian tribe, or shall survey such lands, or designate their boundaries, by marking trees, or otherwise, for the purpose of settlement, he shall forfeit a sum, not exceeding one thousand dollars nor less than one hundred dollars, and suffer imprisonment, not exceeding twelve months, in the discretion of the Court before whom the trial shall be: and it shall, moreover, be lawful for the President of the United States to take such measures as he may judge necessary, to remove from lands belonging to any Indian tribe, any citizens or inhabitants of the United States, who have made, or shall hereafter make, or attempt to make, a settlement thereon.

SECTION 6. That no person shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license the Superintendent, or such other person as the President shall appoint, is hereby authorized to grant, on the same terms, conditions and restrictions, as other licenses are to be granted under this act: *Provided, also*, That every person who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they shall have been brought out of the Indian country, shall make a particular return to the Superintendent, or other person from whom he obtained his license, of every horse by him purchased, as aforesaid, describing such horses by their color, height, and other natural or artificial marks, under the penalties contained in their respective bonds. And every person purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased and brought into any settlement of citizens of the United States, forfeit, for every horse thus purchased, or brought from the Indian country, a sum not more than one

hundred dollars, nor less than thirty dollars, to be recovered in any Court of Record having competent jurisdiction. And every person who shall purchase a horse, knowing him to be brought out of the Indian territory by any person or persons not licensed, as above, to purchase the same, shall forfeit the value of such horse; one-half for the benefit of the informant, the other half for the use of the United States, to be recovered as aforesaid.

SECTION 7. That no agent, superintendent, or other person, authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horses, to or from any Indian; and that any person offending herein, shall forfeit one thousand dollars, and be imprisoned, at the discretion of the Court, before which the conviction shall be had, not exceeding twelve months.

Act of 1793, ch. 19, 1 Stat. 329

SECTION 8. *And be it further enacted*, That no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation or tribe of Indians, for the title or purchase of any lands by them held, or claimed: *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and

adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

SECTION 9. That, in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall and may be lawful for the President of the United States to cause them to be furnished with useful domestic animals and implements of husbandry, and also to furnish them with goods or money, in such proportions as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think proper: *Provided*, That the whole amount of such presents, and allowance to such agents, shall not exceed twenty thousand dollars per annum.

SECTION 10. That the Superior Courts of each of the said Territorial districts, and the Circuit Courts, and other Courts of the United States, of similar jurisdiction in criminal causes, in each district of the United States, into which any offender against this act shall be first brought, or in which he shall be apprehended, shall have, and are hereby invested with, full power and authority, to hear and determine all crimes, offences, and misdemeanors, against this act; such Courts proceeding therein in the same manner as if such crimes, offences and misdemeanors, has been committed within the bounds of their respective districts: and in all cases where the punishment shall not be death, the County Courts of Quarter Sessions in the said Territorial districts, and the District Courts of the United States in their respective districts, shall have, and are hereby invested with, like power to hear and determine the same.

SECTION 11. That it shall and may be lawful for the President of the United States, and for the Governors of such Territorial districts, respectively, on proof to them made, that any citizen or citizens of the United States, or of the said districts, or either of them, have been guilty of any of the said

crimes, offences, or misdemeanors, within any town, settlement, or territory, belonging to any nation or tribe of Indians, to cause such person or persons to be apprehended, and brought into either of the United States, or of the said districts, and to be proceeded against in due course of law. And in all cases where the punishment shall be death, it shall be lawful for the Governor of the district into which the offender may be first brought, or in which he may be apprehended, to issue a commission of Oyer and Terminer to the Superior Judges of the district, who shall have full power and authority to hear and determine all such capital cases, in the same manner as the Superior Courts of such districts have, in their ordinary sessions. And when the offender shall be brought into, or shall be apprehended in, any of the United States, except Kentucky, it shall be lawful for the President of the United States to issue a like commission to any two Judges of the Supreme Court of the United States and the Judge of the district, in which the offender may have been apprehended or first brought; which Judges, or any two of them, shall have the same jurisdiction, in such capital cases, as the Circuit Court of such district, and shall proceed to trial and judgment, in the same manner as such Circuit Court might or could do.

SECTION 12. That all fines and forfeitures, which shall accrue under this act, shall be, one-half to the use of the informant, and the other half to the use of the United States, except where the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

SECTION 13. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the jurisdiction of any of the individual states.

SECTION 14. That all and every other act and acts, coming within the purview of this act, shall be, and are hereby, repealed.

SECTION 15. That this act shall be in force for the term of two years, and from thence to the end of the then next session of Congress, and no longer.

Act of 1796, ch. 30, 1 Stat. 469

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following boundary line, established by treaty between the United States and various Indian tribes, shall be clearly ascertained, and distinctly marked, in all such places, as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: Beginning at the mouth of Cayahoga river on Lake Erie, and running thence up the same, to the portage between that end and the Tuscaroras branch of the Muskingum; thence down that branch, to the crossing place above Fort Lawrence; thence westerly to a fork of that branch of the Great Miami river, running into the Ohio, at, or near which fork, stood Laromie's store, and where commences that portage, between the Miami of the Ohio, and Saint Mary's river, which is a branch of the Miami, which runs into Lake Erie; thence a westerly course to Fort Recovery, which stands on a branch of the Wabash; thence southwesterly, in a direct line to the Ohio, so as to intersect that river, opposite the mouth of Kentucky or Cuttawa river; thence down the said river Ohio, to the tract of one hundred and fifty thousand acres, near the rapids of the Ohio, which has been assigned to General Clark, for the use of himself and his warriors; thence around the said tract, on the line of said tract, till it shall again intersect the said river Ohio; thence down the same, to a point opposite the high lands or ridge between the mouth of the Cumberland and Tennessee rivers; thence easterly on the said right, to a point, from whence, a southwest line will strike

the mouth of Duck river; thence still easterly on the said ridge, to a point forty miles above Nashville; thence northwest, to Cumberland river; thence up the said river to where Kentucky road crosses the same; thence to the top of Cumberland mountain; thence along Campbell's line, to the river Clinch; thence down the said river, to a point from which a line shall pass the Holsten, at the ridge, which devides the waters running into Little River, from those running into the Tennessee; thence south, to the North Carolina boundary; thence along the South Carolina Indian boundary, to and over the Ocunna mountain, in a southwest course, to Tugelo river; thence in a direct line, to the top of the Currahee mountain, where the Creek line passes it; thence to the head or source of the main south branch of the Oconee river, called the Appalachee; thence down the middle of the said main south branch and river Oconee, to its confluence with Oakmulgee, which forms the river Altamaha; thence down the middle of the said Altamaha, to the old line on the said river; and thence along the said old line to the river Saint Mary's; *Provided always*, that if the boundary line between the said Indian tribes and the United States, shall, at any time hereafter, be varied, by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act, shall be construed to apply to the said line so to be varied, in the same manner, as the said provisions now apply to the boundary line herein before recited.

Act of 1796, ch. 30, 1 Stat. 469

SECTION 2. That if any citizen of, or other person resident in the United States, or either of the territorial districts of the United States, shall cross over, or go within the said boundary line, to hunt, or in anywise destroy the game; or shall drive, or otherwise convey any stock of horses or cattle to range, on any lands allotted or secured by treaty with the United States, to any Indian tribes, he shall forfeit a sum not exceeding one hundred dollars, or be imprisoned not exceeding six months.

SECTION 3. That if any such citizen, or other person, shall go into any country which is allotted or secured by treaty as aforesaid, to any of the Indian tribes south of the river Ohio, without a passport first had and obtained from the Governor of some one of the United States, or the officer of the troops of the United States commanding at the nearest post on the frontiers, or such other person as the President of the United States may from time to time authorize to grant the same, shall forfeit a sum not exceeding fifty dollars, or be imprisoned, not exceeding three months.

SECTION 4. That if any such citizen, or other person shall go into any town, settlement, or territory, belonging, or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass, or other crime, against the person or property of any friendly Indian or Indians, which would be punishable, if committed within the jurisdiction of any State, against a citizen of the United States; or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding twelve months; and shall, also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed; and if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the Treasury of the United States: *Provided, nevertheless*, That no such Indian shall be entitled to any payment out of the Treasury of the United States for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence.

SECTION 5. That if any such citizen, or other person, shall make a settlement on any lands belonging, or secured, or

granted by treaty with the United States, to any Indian tribe, or shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit all his right, title, and claim, if any he hath, of whatsoever nature or kind the same shall or may be, to the lands aforesaid, whereupon he shall make a settlement, or which he shall survey, or attempt to survey, or designate any of the boundaries thereof, by marking trees or otherwise, and shall also forfeit a sum not exceeding one thousand dollars, and suffer imprisonment not exceeding twelve months. And it shall, moreover, be lawful for the President of the United States to take such measures and to employ such military force, as he may judge necessary, to remove from lands belonging, or secured by treaty, as aforesaid, to any Indian tribe, any such citizen or other person, who has made or shall hereafter make, or attempt to make, a settlement thereon; and every right, title, or claim, forfeited under this act, shall be taken and deemed to be vested in the United States, upon conviction of the offender, without any other or further proceeding.

SECTION 6. That if any such citizen, or other person shall go into any town, settlement, or territory, belonging to any nation or tribe of Indians, and shall there commit murder, by killing any Indian or Indians belonging to any nation or tribe of Indians in amity with the United States, such offender, on being thereof convicted, shall suffer death.

SECTION 7. That no such citizen, or other person, shall be permitted to reside at any of the towns or hunting camps, or any of the Indian tribes as a trader, without a license under the hand and seal of the superintendent of the department, or of such other person as the President of the United States shall authorize to grant licenses for that purpose; which superintendent, or person authorized, shall, on application, issue such license, for a term not exceeding two years, who shall enter into bond with one or more sureties, approved of by the superintendent, or person issuing such license, or by the President of the

United States, in the penal sum of one thousand dollars, conditioned for the true and faithful observance of such regulations and restrictions as are or shall be made for the government of trade and intercourse with the Indian tribes: and the superintendent, or person issuing such license, shall have full power and authority to recal the same, if the person so licensed shall transgress any of the regulations or restrictions, provided for the government of trade and intercourse with the Indian tribes; and shall put in suit such bonds as he may have taken, on the breach of any condition therein contained.

SECTION 8. That any such citizen, or other person, who shall attempt to reside in any town or hunting camp of any of the Indian tribes as a trader, without such license, shall forfeit all the merchandise offered for sale to the Indians, or found in his possession, and shall, moreover, be liable to a fine not exceeding one hundred dollars, and to imprisonment not exceeding thirty days.

SECTION 9. That if any such citizen, or other person, shall purchase, or receive of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians in their intercourse with white people, or any article of clothing, except skins or furs, he shall forfeit a sum not exceeding firty dollars, and be imprisoned not exceeding thirty days.

SECTION 10. That no such citizen, or other person, shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person as the President shall appoint, is hereby authorized to grant, on the same terms, conditions, and restrictions, as other licenses are to be granted under this act. And any such person who shall purchase a horse or horses under such license, before he exposes such horse or horses for sale, and within fifteen

days after they have been brought out of the Indian country, shall make a particular return to the superintendent, or other person, from whom he obtained his license, of every horse purchased by him, aforesaid; describing such horses by their color, height, and other natural or articial marks, under the penalty contained in their respective bonds. And every such person purchasing a horse or horses, as aforesaid, in the Indian country, without a special license, shall, for every horse thus purchased and brought into any settlement of citizens of the United States, forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding thirty days. And every person who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons not licensed as above to purchase the same, shall forfeit the value of such horses.

SECTION 11. That no agent, superintendent, or other person, authorized to grant a license to trade or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horse to or from any Indian, excepting for and on account of the United States. And any person offending herein, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

SECTION 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation or tribe of Indians within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty, or convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held, or claimed, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve

months: *Provided nevertheless*, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians, under the authority of the United States, in the presence and with the approbation of the commissioner or commissioner of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

SECTION 13. That, in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons from time to time, as temporary agents, to reside among the Indians, as he shall think fit: *Provided*, That the whole amount of such presents and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

SECTION 14. That if any Indian or Indians belonging to any tribe in amity with the United States, shall come over or cross the said boundary line, into any State or territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence, or outrage, upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant, his representative, attorney, or agent, to make application to the superintendent, or such other person as the President of the United States shall authorize for that purpose; who, upon being furnished with the necessary documents and proofs, shall, under the direction or instruction of the President of the United States, make application to the nation or tribe to which such Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction in a

reasonable time, not exceeding eighteen months, then it shall be the duty of such superintendent or other person authorized, as aforesaid, to make return of his doings to the President of the United States, and forward to him all the documents and proofs in the case, that such further steps may be taken, as shall be proper to obtain satisfaction for the injury: and in the meantime, in respect to the property so taken, stolen, or destroyed, the United States guarantee to the party injured an eventual indemnification: *Provided, always,* That if such injured party, his representative, attorney, or agent, shall in any way violate any of the provisions of this act, by seeking, or attempting to obtain private satisfaction or revenge, by crossing over the line, on any of the Indian lands, he shall forfeit all claim upon the United States for such indemnification: *And provided, also,* That nothing herein contained shall prevent the legal apprehension or arresting within the limits of any State or district of any Indian having so offended: *And provided, further,* That it shall be lawful for the President of the United States to deduct such sum or sums as shall be paid for the property taken, stolen, or destroyed by any such Indian, out of the annual stipend which the United States are bound to pay to the tribe to which such Indian shall belong.

SECTION 15. That the superior courts in each of the said territorial districts, and the circuit courts, and other courts of the United States of similar jurisdiction in criminal causes, in each district of the United States, in which any offender against this act shall be apprehended, or, agreeably to the provisions of this act, shall be brought for trial, shall have, and are hereby invested with full power and authority to hear and determine all crimes, offences, and misdemeanors, against this act; such courts proceeding therein in the same manner, as if such crimes, offences, and misdemeanors, had been committed within the bounds of their respective districts: and in all cases where the punishment shall not be death, the county courts of quarter sessions in the said territorial districts, and the district courts of the United States in their respective districts, shall

have, and are hereby invested with, like power to hear and determine the same, any law to the contrary notwithstanding: and in all cases where the punishment shall be death, it shall be lawful for the Governor of either of the territorial districts, where the offender shall be apprehended, or into which he shall be brought for trial, to issue a commission of oyer and terminer to the superior judges of such district, who shall have full power and authority to hear and determine all such capital cases, in the same manner as the superior courts of such district have in their ordinary session: and when the offender shall be apprehended, or brought for trial, into any of the United States, except Kentucky, it shall be lawful for the President of the United States to issue a like commission to any one or more judges of the Supreme Court of the United States, and the judge of the district in which such offender may have been apprehended, or shall have been brought for trial; which judges, or any two of them, shall have the same jurisdiction in such capital cases as the circuit court of such district, and shall proceed to trial and judgment in the same manner as such circuit court might or could do. And the district courts of Kentucky and Maine shall have jurisdiction of all crimes, offences, and misdemeanors, committed against this act, and shall proceed to trial and judgment, in the same manner as the circuit courts of the United States.

SECTION 16. That it shall be lawful for the military force of the United States, to apprehend every person who shall or may be found in the Indian country over and beyond the said boundary line between the United States and the said Indian tribes, in violation of any of the provisions or regulations of this act, and him or them immediately to convey in the nearest convenient and safe route, to the civil authority of the United States, in some one of the three next adjoining States or districts, to be proceeded against in due course of law: *Provided*, That no person apprehended by military force as aforesaid, shall be detained longer than ten days after the arrest and before removal.

SECTION 17. That if any person who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territorial districts of the United States, such offender may be there apprehended and brought to trial, in the same manner as if such crime or offence had been committed within such State or district; and it shall be the duty of the military force of the United States, when called upon by the civil magistrate or any proper officer, or other person duly authorized for that purpose and having a lawful warrant, to aid and assist such magistrate, officer, or other person authorized as aforesaid in arresting such offender, and him committing to safe custody, for trial according to law.

SECTION 18. That the amount of fines and duration of imprisonment directed by this act as a punishment for the violation of any of the provisions thereof, shall be ascertained and fixed, not exceeding the limits prescribed, in the discretion of the court before whom the trial shall be had; and that all fines and forfeitures which shall accrue under this act shall be one half to the use of the informant and the other half to the use of the United States; except where the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

SECTION 19. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district, to Mero district; and of the navigation of the Tennessee river, as reserved and secured by treaty.

SECTION 20. That the President of the United States be and he is hereby authorized to cause to be clearly ascertained and distinctly marked, in all such places as he shall deem

necessary, and in such manner as he shall direct, any other boundary lines between the United States and any Indian tribe which now are or hereafter may be established by treaty.

SECTION 21. That all and every other act and acts, coming within the purview of this act, shall be and they are hereby repealed: *Provided nevertheless*, That all disabilities that have taken place shall continue and remain, all penalties and forfeiture that have been incurred may be recovered, and all prosecutions and suits that may have been commenced may be prosecuted to final judgment under the said act or acts, in the same manner as if the said act or acts were continued and in full force and virtue.

SECTION 22. That this act shall be in force for the term of two years, and from thence to the end of the session of Congress next thereafter, and no longer.

Act of 1799, ch. 46, 1 Stat. 743,[1]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the following boundary line, established by treaty between the United States and various Indian tribes shall be clearly ascertained and distinctly marked, in all such places, as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: Beginning at the mouth of the Cayahoga river on Lake Erie, and running thence up the same, to the portage between that and the Tuscaroras branch of the Muskingum; thence, down that . . . . the said old line to the river Saint Mary's: *Provided always*, that if the boundary line between the said Indian tribes and the United States, shall, at

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[1]Sections 2 through 10, 13 through 15, and 17, 18 and 20 are similar in language to the identically numbered sections in the Act of 1796 and will not be repeated.

any time hereafter, be varied by any treaty which shall be made between the said Indian tribes and the United States, then all provisions contained in this act shall be construed to apply to the said line so to be varied, in the same manner as said provisions apply by force of this act to the boundary line herein before recited.

SECTION 11. *And be it further enacted*, That no agent, superintendent, or other person, authorized to grant a license to trade, or purchase horses, shall have any interest or concern in any trade with the Indians, or in the purchase or sale of any horse, to or from any Indian, excepting for and on account of the United States. And any person offending herein, shall forfeit a sum not exceeding one thousand dollars, and be imprisoned not exceeding twelve months.

SECTION 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any ndian, or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by treaty or convention, entered into, pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention, directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held, or claimed, punishable by fine not exceding one thousand dollars, and imprisonment not exceeding twelve months: *Provided, nevertheless*, that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

SECTION 16. That it shall be lawful for the military force of the United States, to apprehend every person who shall, or may, be found in the Indian country over and beyond the said boundary line between the United States and the said Indian tribes, in violation of any of the provisions or regulations of this act, and him or them immediately to convey, in the nearest, convenient, and safe route, to the civil authority of the United States, in some one of the three next adjoining States or districts, to be proceeded against in due course of law: *Provided*, That no person apprehended by military foce, as aforesaid, shall be detained longer than five days after the arrest, and before removal. And all officers and soldiers, who may have any such person or persons in custody, shall treat them with all the humanity which the circumstances will possibly permit; and every officer and soldier who shall be guilty of maltreating any such person, while in custody, shall suffer such punishment as a court martial shall direct: *Provided*, That the officer having custody of such person or persons, shall, if required by such person or persons, conduct him or them to the nearest judge of the supreme or superior court of any State, who, if the offence is bailable, shall take proper bail, if offered, returnable to the district court next to be holden in said district, which bail the said judge is hereby authorized to take, and which shall be liable to be estreated as any other recognizance for bail in any court of the United States; and if said judge shall refuse to act, or the person or persons fail to procure satisfactory bail, then the said person or persons are to be proceeded with according to the directions of this act.

SECTION 19. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district, to Mero district, and of the navigation of the Tennessee river, as reserved and secured by treaty; nor shall this act be construed to prevent any person

or person traveling from Knoxville to Price's settlement (so-called) provided they shall travel in the trace or path which is usually travelled, and provided the Indians make no objection; but if the Indians object, the President of the United States is hereby authorized to issue a proclamation, prohibiting all travelling on said trace, after which, the penalties of this act shall be incurred by every person travelling or being found on said trace, within the Indian boundary without a passport.

SECTION 21. That this act shall be in force from and after the third day of March, one thousand seven hundred and ninety-nine, and shall continue in force the term of three years; and, so far as respects the proceedings under this act, it is to be understood that the act, entitled "An act to amend an act, entitled 'An act giving effect to the laws of the United States within the district of Tennessee,' " is not to operate. And all disabilities which have taken place, shall continue and remain; and all penalties and forfeitures that have been incurred, may be recovered; and all prosecutions and suits which may have been commenced, may be prosecuted to final judgment, under the act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers; which act expires, by its own limitation, on the third day of March, one thousand seven hundred and ninety-nine, in the same manner as if the said act was continued in force.

Act of 1802, ch. 13, 2 Stat. 139,[2]

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress*

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[2]Sections 2, 3, 6 through 8, 11, 14, 15, 17, 18 and 20 are similar in language to the identically numbered sections in the Act of 1796 so they won't be repeated.

Section 16 is similar in language to Section 16 of the Act of 1799 so it won't be repeated.

assembled, That the following boundary line, established by treaty between the United States and various Indian tribes, shall be clearly ascertained, and distinctly marked in all such places as the President of the United States shall deem necessary, and in such manner as he shall direct, to wit: . . . *Provided always*, that if the boundary line between he said Indian tribes and the United States, shall, at any time hereafter, be varied, by any treaty which shall be made between the said Indian tribes and the United States, then all the provisions contained in this act, shall be construed to apply to the said line so to be varied, in the same manner, as said provisions apply, by force of this act, to the boundary line herein before recited.

SECTION 4. That if any robbery, larceny, trespass, or any other crime, against the person or property of any friendly Indian or Indians, which would be punishable, if committed within the jurisdiction of any State, against a citizen of the United States; or, unauthorized by law, and with a hostile intention, shall be found on any Indian land, such offender shall forfeit a sum not exceeding on-hundred dollars, and be imprisoned not exceeding twelve months; and shall also, when property is taken or destroyed, forfeit and pay to such Indian or Indians, to whom the property taken and destroyed belongs, a sum equal to twice the just value of the property so taken or destroyed; and if such offender shall be unable to pay a sum at least equal to the said just value, whatever such payment shall fall short of the said just value, shall be paid out of the Treasury of the United States: *Provided, nevertheless*, That no such Indian shall be entitled to any payment out of the Treasury of the United States, for any such property taken or destroyed, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempt to obtain satisfaction by any force or violence.

SECTION 5. That if any such citizen, or other person, shall make a settlement on any lands belonging or secured, or granted by treaty with the United States, to any Indian tribe, or

shall survey, or attempt to survey, such lands, or designate any of the boundaries, by marking trees, or otherwise, such offender shall forfeit a sum not exceeding one thousand dollars, and suffer imprisonment not exceeding twelve months. And it shall, moreover, be lawful for the President of the United States to take such measures, and to employ such military force, as he may judge necessary, to remove from lands, belonging or secured by treaty, as aforesaid, to any Indian tribe, any such citizen, or other person, who has made, or shall hereafter make, or attempt to make a settlement thereon.

SECTION 9. *And be it further enacted*, That if any such citizen, or other person, shall purchase, or receive of any Indian, in the way of trade or barter, a gun, or other article commonly used in hunting, any instrument of husbandry, or cooking utensil, of the kind usually obtained by the Indians, in their intercourse with white people, or any article of clothing, excepting skins or furs, he shall forfeit a sum not exceeding fifty dollars, and be imprisoned not exceeding thirty days.

SECTION 10. *And be it further enacted*, That no such citizen, or other person, shall be permitted to purchase any horse of an Indian, or of any white man in the Indian territory, without special license for that purpose; which license, the superintendent, or such other person as the President shall appoint, is hereby authorized to grant, on the same terms, conditions, and restrictions, as other licenses are to be granted under this act: and any such person, who shall purchase a horse or horses, under such license, before he exposes such horse or horses for sale, and within fifteen days after they have been brought out of the Indian country, shall make a particular return to the superintendent, or other person, from whom he obtained his license, of every horse purchased by him as aforesaid; describing such horses by their color, height, and other natural or artificial marks, under the penalty contained in their respective bonds; and every such person purchasing a horse or horses, as aforesaid, in the Indian country, without a

special license, shall, for every horse thus purchased and brought into any settlement of citizens of the United States, forfeit a sum not exceeding one hundred dollars, and be imprisoned not exceeding thirty days; and every person who shall purchase a horse, knowing him to be brought out of the Indian territory, by any person or persons. not licensed, as above, to purchase the same, shall forfeit the value of such horse.

SECTION 12. *And be it further enacted,* That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian, or nation, or tribe of Indians, within the bounds of the United States, shall be of any validity, in law or equity, unless the same be made by treaty or convention, entered into pursuant to the constitution: and it shall be a misdemeanor in any person, not employed under the authority of the United States, to negotiate such treaty or convention directly or indirectly, to treat with any such Indian nation, or tribe of Indians, for the title or purchase of any lands by them held or claimed, punishable by fine not exeeding one thousand dollars, and imprisonment not exceeding twelve months: *Provided, nevertheless,* that it shall be lawful for the agent or agents of any state, who may be present at any treaty held with Indians, under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of he United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

SECTION 13. *And be it further enacted,* That in order to promote civilization among the friendly Indian tribes, and to secure the continuance of their friendship, it shall be lawful for the President of the United States to cause them to be furnished with useful domestic animals, and implements of husbandry, and with goods or money, as he shall judge proper, and to appoint such persons, from time to time, as temporary agents, to reside among the Indians, as he shall think fit: *Provided,*

That the whole amount of such presents, and allowance to such agents, shall not exceed fifteen thousand dollars per annum.

SECTION 19. *And be it further enacted*, That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the ordinary jurisdiction of any of the individual states; or the unmolested use of a road from Washington district to Mero district, or to prevent the citizens of Tennessee from keeping in repair the said road, under the direction or orders of the governor of said state, and of the navigation of the Tennessee river, as reserved and secured by treaty; nor shall this act be construed to prevent any person or persons travelling from Knoxville to Price's settlement, or to the settlement on Obed's river (so called), provided they shall travel in the trace or path which is usually travelled, and provided the Indians make no objection; but if the Indians object, the President of the United States is hereby authorized to issue a proclamation, prohibiting all travelling on said traces, or either of them, as the case may be, after which, the penalties of this act shall be incurred by every person travelling or being found on said traces, or either of them, to which the prohibition may apply, within the Indian boundary, without a passport.

SECTION 21. That the President of the United States be authorized to take such measures, from time to time, as to him may appear expedient to prevent or restrain the vending or distributing of spiritous liquors among all or any of the said Indian tribes, anything herein contained to the contrary thereof notwithstanding.

SECTION 22. That this act shall be in force from the passage thereof; and as far as respects the proceedings under this act, it is to be understood that the act, entitled "An Act to amend an act, entitled 'An act giving effect to the laws of the

United States within the district of Tennessee,' " is not to operate.

Act of 1834, ch. 161, 4 Stat. 729

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi river, and not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country.

SECTION 2. That no person shall be permittd to trade with any of the Indians (in the Indian country) without a license therefor from a superintendent of Indian affairs, or Indian agent, or sub-agent, which license shall be issued for a term not exceeding two years for the tribes east of the Mississippi, and not exceeding three years for the tribes west of that river. And the person applying for such license shall give bond in a penal sum not exceeding five thousand dollars, with one or more sureties, to be approved by the person issuing the same, conditioned that such person will faithfully observe all the laws and regulations made for the government of trade and intercourse with the Indian tribes, and in no respect violate the same. And the superintendent of the district shall have power to revoke and cancel the same, whenever the person licensed shall, in his opinion, have transgressed any of the laws or regulations provided for the government of trade and intercourse with the Indian tribes, or that it would be improper to permit him to remain in the Indian country. And no trade with the said tribes shall be carried on withi their boundary, except at certain suitable and convenient places, to be designated from time to time by the superintendents, agents, and sub-agents, and to be inserted in the license. And it shall be the duty of the persons

granting or revoking such licenses, forthwith to report the same to the commissioner of Indian affairs, for his approval or disapproval.

SECTION 3. That any superintendent or agent may refuse an application for a license to trade, if he is satisfied that the applicant is a person of bad character, or that it would be improper to permit him to reside in the Indian country; or if a license, previously granted to such applicant, has been revoked, or a forfeiture of his bond decreed. But an appeal may be had from the agent or the Superintendent, to the commissioner of Indian affairs; and the President of the United States shall be authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected; and no trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

SECTION 4. That any person other than an Indian who shall attempt to reside in the Indian country as a trader, or to introduce goods, or to trade therein without such license, shall forfeit all merchandise offered for sale to the Indians, or found in his possession, and shall moreover forfeit and pay the sum of five hundred dollars.

SECTION 5. That no license to trade with the Indians shall be granted to any person except citizens of the United States: *Provided,* That the President shall be authorized to allow the employment of foreign boatmen and interpreters, under such regulations as he may prescribe.

SECTION 6. That if a foreigner shall go into the Indian country without a passport from the War Department, the superintendent, agent, or sub-agent of Indian affairs, or from

the officer of the United States commanding the nearest military post on the frontiers, or shall remain intentionally therein after the expiration of such passport, he shall forfeit and pay the sum of one thousand dollars; and such passport shall express the object of such person, the time he is allowed to remain, and the route he is to travel.

SECTION 7. That if any person other than an Indian shall within the Indian country, purchase or receive of any Indian, in the way of barter, trade, or pledge, a gun, trap, or other article commonly used in hunting, any instrument of husbandry or cooking utensils of the kind commonly obtained by the Indians in their intercourse with the white people, or any other article of clothing, except skins or furs, he shall forfeit and pay the sum of fifty dollars.

SECTION 8. That if any person, other than an Indian, shall, within the limits of any tribe with whom the United States shall have existing treaties, hunt, or trap, or take and destroy, any peltries or game, except for subsistence in the Indian country, such person shall forfeit the sum of five hundred dollars, and forfeit all the traps, guns, and ammunition in his possession, used or procured to be used for that purpose, and peltries so taken.

SECTION 9. That if any person shall drive, or otherwise convey any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, such person shall forfeit the sum of one dollar for each animal of such stock.

SECTION 10. That the superintendent of Indian affairs, and Indian agents and sub-agents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the President of the United States is authorized to direct the military force to be employed in such removal.

SECTION 11. That if any person shall make a settlement on any lands belonging secured, or granted by treaty with the United States to any Indian tribe, or shall survey or shall attempt to survey such lands, or designate any of the boundaries by marking trees, or otherwise, such offender shall forfeit and pay the sum of one thousand dollars. And it shall, moreover, be lawful for the President of the United States to take such measures, and to employ such military force, as he may judge necessary to remove from the lands as aforesaid any such person as aforesaid.

SECTION 12. *And be it further enacted*, That no purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the constitution. And if any person, not employed under the authority of the United States shall attempt to negotiate such treaty or convention, directly or indirectly, to treat with any such nation or tribe of Indians, for the title or purchase of any lands by them held or claimed, such person shall forfeit and pay one thousand dollars: *Provided, nevertheless*, That it shall be lawful for the agent or agents of any state who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner or commissioners of the United States appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by treaty.

SECTION 13. That if any citizen or other person residing within the United States or the territory thereof, shall sent any talk, speech, message, or letter to any Indian nation, tribe, chief, or individual, with an intent to produce a contravention or infraction of any treaty or other law of the United States, or to disturb the peace and tranquility of the United States, he shall forfeit and pay the sum of two thousand dollars.

SECTION 14. That if any citizen, or other person, shall carry or deliver any such talk, message, speech, or letter, to or from any Indian nation, tribe, chief, or individual, from or to any person or persons whatsoever, residing within the United States, or from or to any subject,citizen, or agent of any foreign power or state, knowing the contents thereof, he shall forfeit and pay the sum of one thousand dollars.

SECTION 15. That if any citizen or other person, residing or living among the Indians, or elsewhere within the territory of the United States, shall carry on a correspondence, by letter or otherwise, with any foreign nation or power, with an intent to induce such foreign nation or power to excite any Indian nation, tribe, chief, or individual, to war against the United States, or to the violation of any existing treaty; or in case any citizen or other person shall alienate, or attempt to alienate, the confidence of any Indian or Indians from the government of the United States, he shall forfeit the sum of one thousand dollars.

SECTION 16. That where, in the commission, by a white person, of any crime, offence, or misdemeanor, within the Indian country, the property of any friendly Indian is taken, injured or destroyed, and a conviction is had for such crime, offence, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed. And if such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the treasury of the United States: *Provided*, That no such Indian shall be entitled to any payment, out of the treasury of the United States, for any such property, if he, or any of the nation to which he belongs, shall have sought private revenge, or attempted to obtain satisfaction by any force or violence: *And provided, also*, That if such offender cannot be apprehended and brought

to trial, the amount of such property shall be paid out of the treasury, as aforesaid.

SECTION 17. That if any Indian or Indians, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from the Indian country into any state or territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, horses, or other property, belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper superintendent, agent, or sub-agent, who, under the direction of the President, make application to the nation or tribe to which said Indian or Indians shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time, not exceeding twelve months, it shall be the duty of such superintendent, agent, or sub-agent, to make return of his doings to the commissioner of Indian affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury; and, in the mean time, in respect to the property so taken, stolen or destroyed, the United States guaranty, to the party so injured, an eventual indemnification: *Provided*, That, if such injured party, his representative, attorney, or agent, shall, in any way, violate any of the provisions of this act, by seeking or attempting to obtain private satisfaction or revenge, he shall forfeit all claim upon the United States for such indemnification: *And provided, also*, That, unless such claim shall be presented within three years after the commission of the injury, the same shall be barred. And if the nation or tribe to which such Indian may belong, receive an annuity from the United States, such claim shall, at the next payment of the annuity, be deducted therefrom, and paid to the party injured; and, if no annuity is payable to such nation or tribe, then the amount of the claim shall be paid from the treasury of the United States: *Provided*, That nothing herein contained shall prevent the legal

apprehension and punishment of any Indians having so offended.

SECTION 18. That the superintendents, agents, and sub-agents, within their respective districts, be, and are hereby, authorized and empowered to take depositions of witnesses touching any depredations, within the purview of the two preceding sections of this act, and to administer an oath to the deponents.

SECTION 19. That it shall be the duty of the superintendents, agents, and sub-agents, to endeavor to procure the arrest and trial of all Indians accused of committing any crime, offence, or misdemeanor, and all other persons who may have committed crimes or offences within any state or territory, and have fled into the Indian country, either by demanding the same of the chiefs of the proper tribe, or by such other means as the President may authorize; and the President may direct the military force of th United States to be employed in the apprehension of such Indians, and also, in preventing or terminating hostilities between any of the Indian tribes.

SECTION 20. That if any person shall sell, exchange, or give, barter, or dispose of, any spiritous liquor or wine to any Indian, (in the Indian country,) such person shall forfeit and pay the sum of five hundred dollars; and if any person shall introduce, or attempt to introduce, any spiritous liquor or wine into the Indian country, except such supplies as shall be necessary for the officers of the United States and troops of the service, under the direction of the War Department, such person shall forfeit and pay a sum not exceeding three hundred dollars; and if any superintendent of Indian affairs, Indian agent, or sub-agent, or commanding officer of a military post, has reason to suspect, or is informed, that any white person or Indian is abot to introduce, or has introduced, any spiritous liquor or wine into the Indian country, in violation of the provisions of this section, it shall be lawful for such superinten-

dent, Indian agent, or sub-agent, or military officer, agreeably to such regulations as may be established by the President of the United States, to cause the boats, stores, packages, and places of deposit of such person to be searched, and if any such spiritous liquor or wine is found, the goods, boats, packages, and peltries of such persons shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the use of the informer, and the other half to the use of the United States; and if such person is a trader, his license shall be revoked and his bond put in suit. And it shall moreover be lawful for any person, in the service of the United States, and for any Indian, to take and destroy any ardent spirits or wine found in the Indian country, excepting military supplies as mentioned in this section.

SECTION 21. That if any person whatever shall, within the limits of the Indian country, set up or continue any distillery for manufacturing ardent spirits, he shall forfeit and pay a penalty of one thousand dollars; and it shall be the duty of the superintendent of Indian affairs, Indian agent, or sub-agent, within the limits of whose agency the same shall be set up or continued, forthwith to destroy and break up the same; and it shall be lawful to employ the military force of the United States in executing that duty.

SECTION 22. That in all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

SECTION 23. That it shall be lawful for the military force of the United States to be employed in such manner and under such regulations as the President may direct, in the apprehension of every person who shall or may be found in the Indian country, in violation of any of the provisions of this act, and

him immediately to convey from said Indian country, in the nearest convenient and safe route, to the civil authority of the territory or judicial district in which said person shall be found, to be proceeded against in due course of law; and also, in the examination and seizure of stores, packages, and boats, authorized by the twentieth section of this act, and in preventing the introduction of persons and property into the Indian country contrary to law; which persons and property shall be proceeded against according to law: *Provided*, That no person apprehended by military force as aforsaid, shall be detained longer than five days after the arrest and before removal. And all officers and soldiers who may have any such person or persons in custody shall treat them with all the humanity which the circumstances will possibly permit; and every officer or soldier who shall be guilty of maltreating any such person while in custody, shall suffer such punishment as a court-martial shall direct.

SECTION 24. That for the sole purpose of carrying this act into effect, all that part of the Indian country west of the Mississippi river, that is bounded north by the north line of lands assigned to the Osage tribe of Indians, produced east to the state of Missouri: west, by the Mexican possessions; south by Red river; and east, by the west line of the territory of Arkansas and the state of Missouri, shall be, and hereby is, annexed to the territory of Arkansas; and that for the purpose aforesaid, the residue of the Indian country west of the said Mississippi river shall be, and hereby is, annexed to the judicial district of Missouri; and for the purpose aforesaid, *the several portions of Indian country east of the said Mississippi river, shall be, and are hereby, severally annexed to the territory in which they are situate.*

SECTION 25. That so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country:

Provided. The same shall not extend to crimes committed by one Indian against the person or property of another Indian.

SECTION 26. That if any person who shall be charged with a violation of any of the provisions or regulations of this act, shall be found within any of the United States, or either of the territories, such offenders may be there apprehended, and transported to the territory or judicial district having jurisdiction of the same.

SECTION 27. That all penalties which shall accrue under this act, shall be sued for and recovered in an action of debt, in the name of the United States, before any court having jurisdiction of the same, (in any state or territory in which the defendant shall be arrested or found,) the one half to the use of the informer, and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

SECTION 28. That when goods or other property shall be seized for any violation of this act, it shall be lawful for the person prosecuting on behalf of the United States to proceed against such goods, or other property, in the manner directed to be observed in the case of goods, wares, or merchandise brought into the United States in violation of the revenue laws.

SECTION 29. That the following acts and parts of acts shall be, and the same are hereby, repealed, namely: An act to make provision relative to rations for Indians, and to their visits to the seat of government, approved May thirteen, eighteen hundred; an act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved March thirty, eighteen hundred and two; an act supplementary to the act passed thirtieth March, eighteen hundred and two, to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved April twenty-nine,

eighteen hundred and sixteen; an act for the punishment of crimes and offences committed within the Indian boundaries, approved March three, eighteen hundred and seventeen; the first and second sections of the act directing the manner of appointing Indian agents, and continuing the "Act establishing trading-houses with the Indian tribes," approved April sixteen, eighteen hundred and eighteen; an act fixing the compensation of Indian agents and factors, approved April twenty, eighteen hundred and eighteen; an act supplementary to the act entitled "An act to provide for the prompt settlement of public accounts," approved February twenty-four, eighteen hundred and nineteen; the eighth section of the act making appropriations to carry into effect treaties concluded with several Indian tribes therein mentioned, approved March three, eighteen hundred and nineteen; the second section of the act to continue in force for a further time the act entitled "An act for establishing trading-houses with the Indian tribes, and for other purposes," (a) approved March three, eighteen hundred and nineteen; an act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers," approved thirtieth of March, eighteen hundred and two, approved May six, eighteen hundred and twenty-two; an act providing for the appointment of an agent for the Osage Indians west of the state of Missouri and territory of Akansas, and for other purposes, approved May eighteen, eighteen hundred and twenty-four; the third, fourth, and fifth sections of "An act to enable the President to hold treaties with certain Indian tribes, and for other purposes," approved May twenty-five, eighteen hundred and twenty-four; the second section of the "Act to aid certain Indians of the Creek nation in their removal to the west of the Mississippi," approved May twenty, eighteen hundred and twenty-six; and an act to authorize the appointment of a sub-agent to the Winnebago Indians on Rock river, approved February twenty-five, eighteen hundred and thirty-one: *Provided, however*, That such repeal shall not effect [affect] any right acquired, or punishments, penalties, or forfeitures incurred, under either of the acts or parts of acts, nor

impair or affect the intercouse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi: *And provided also*, That such repeal shall not be construed to revive any acts or parts of acts repealed by either of the acts or sections herein described.

SECTION 30. That until a western territory shall be established, the two agents for the Western territory, as provided in the act for the organization of the Indian department, this day approved by the President, shall execute the duties of agents for such tribes as may be directed by the President of the United States. And it shall be competent for the President to assign to one of the said agents, in addition to his proper duties, the duties of superintendent for such district of country or for such tribes as the President may think fit. And the powers of the superintendent at St. Louis, over such district or tribes, as may be assigned to such acting superintendent, shall cease: *Provided*, That no additional compensation shall be allowed for such services.

SECTION 29. *And be it further enacted*, That the following acts and parts of acts shall be, and the same are hereby repealed namely: . . . *Provided, however*, That such repeal shall not effect [affect] any rights acquired, or punishments, penalties, or forfeitures incurred, under either of the acts or parts of acts, nor impair or affect the intercourse act of eighteen hundred and two, so far as the same relates to or concerns Indian tribes residing east of the Mississippi: *And provided also*, That such repeal shall not be construed to revive any acts or parts of acts repealed by either of the acts or sections herein described.

25 U.S.C. § 177 (1963).

No purchase, grant, lease, or other convenience of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the

same be made by treaty or convention entered into pursuant to the Constitution . . . .

APPENDIX D

Land
29306-1899

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS
WASHINGTON

July 10, 1899.

Francis M. Morrison, Esq.,
492 Main St.,
Worcester, Mass.

Sir:—

With reference to certain contracts between the Mohegan, Shinnecock and Narragansett tribes or bands of Indians and yourself, the following communication, dated June 23, 1899, addressed to this office by the Honorable Acting Secretary of the Interior, is furnished for your information:—

"I am in receipt of your letter of the 10th instant, transmitting a contract (in triplicate) executed on the 8th ultimo, by persons purporting to represent the Mohegan tribe of Indians of Connecticut, and Francis M. Morrison, attorney at law, of Worcester, Mass., and a similar contract, executed on the 12th ultimo, by persons purporting to represent the Shinnecock tribe of Indians of New York, and the same party: also of your letter of the 16th instant, transmitting a like contract, executed on the 8th instant by parties purporting to represent the Narragansett tribe of Indians of Rhode Island and Mr. Morrison.

All of these contracts stipulate for the employment of Mr. Morrison to prosecute the claims of the several tribes and of the individual members thereof to distributive shares of the amount awarded by the Court of Claims in the suit of the New York Indians vs. The United States, for compensation for lands in Kansas set apart for the New York Indians by the Treaty of

Buffalo Creek, January 15, 1838, it appearing that each of these tribes claims an interest in the aforesaid judgment through alleged relationship with the Brothertown band or clan, a branch of the New York Indians.

For the reasons stated in your letter you have approved the said contracts, which provide for a fee of thirty-five per cent of the amounts that may be recovered, and submit the same for such action as may seem appropriate.

These Indians were and their remnants are residents of a section of that portion of the country which constituted the territory of the thirteen original States, as recognized by Great Britain in 1783. No treaties of agreements were ever made with them by the general government, nor has it ever exercised any supervision or control over them. Their political status is unknown, but it is presumed that they are citizens and subject to the laws of the several States in which they reside, and entitled to the rights and privileges of such citizenship.

Their political condition is, therefore, radically different from that of what might be termed the "plains" Indians, that large body of persons in the western section of the country who became subjects or wards of the government with the accession of territory ceded by France in 1803; by the annexation of Texas in 1845; with the territory ceded by Mexico in 1848, and by the cession known as the Gadsden Purchase, in 1853, not all of whom, however, have been officially recognized as wards by formal treaty or agreement.

All of these "plains" Indians have been at some time or other, in some manner or other, the subject of legislation by the Congress of the United States, and to that extent recognized by the Government, so that contracts with them, to be valid and binding, unless, in the meantime, they have become citizens of the United States by the formal action of Congress, require the approval of the Secretary of the Interior.

But the Mohegans, Shinnecocks, and Narragansetts appearing to be citizens of the United States, the Secretary of the Interior is without authority to approve the contracts in question, and the same are returned for such disposition as may seem to be appropriate."

Very respectfully,

/s/ W. A. Jones

Commissioner.

E.B.F.

C

APPENDIX E

Mrs. Edith M. Smith,
904 West Superior Street,
Alma, Michigan.

Oct. 12, 1931

Dear Madam:

The receipt is acknowledged of your letter of October 1, relative to the possibility of governmental assistance on account of your deceased husband's Indian ancestry. You say that Mr. Smith was a quarter-blood Connecticut Indian of the Penobscott Tribe.

The Indians of Connecticut are not under Federal jurisdiction or control, being in the category of so-called "State" Indians. They have never been regarded as wards of the United States, which under the decisions of the Comptroller General precludes the expenditure of funds for their benefit at our disposal. It is, therefore, regretted that we cannot render you any assistance.

We have no record as to births and deaths among these Indians. Perhaps the State Bureau of Vital Statistics at Hartford, Connecticut, could supply you with the desired information if available.

Sincerely yours,

(Signed) C. J. Rhoads

Commissioner.
Mcy.

10-jma-9